In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-804

GEORGE R. CAESAR, M.D.,
Petitioner,

vs.

LOUIS P. MOUNTANOS, as Sheriff
of the County of Marin,
State of California, et al.,
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

KURT W. MELCHIOR
One Embarcadero Center, 25th Floor
San Francisco, California 94111
Telephone (415) 398-3344
Counsel for Petitioner

SEVERSON, WERSON, BERKE & MELCHIOR
NICHOLAS S. FREUD
JAN T. CHILTON
Of Counsel

SORG PRINTING COMPANY OF CALIFORNIA, 346 FIRST STREET, SAN FRANCISCO 94105

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Petitioner George R. Caesar, M.D., respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on September 13, 1976.[1]

OPINION BELOW

The opinions of the Court of Appeals, not yet officially reported, appear in the Appendix hereto. Portions of that opinion were unofficially reported at 45 U.S. Law Week 2191. No opinion was rendered by the District Court for the Northern District of California.

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1. The respondents not named in the caption are: The Superior Court of the State of California in and for the County of Marin, the Honorable Joseph G. Wilson, as Judge of that Court, Hans Van Boldrick and the County of Marin. Their various capacities in relation to this case are explained in the Statement of the Case.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on September 13, 1976. This petition for certiorari is filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Is California Evidence Code Section 1016 an overbroad intrusion upon a psychiatric patient's constitutionally protected right of privacy because it compels his physician to disclose, in routine civil litigation involving the patient, all confidential communications between physician and patient made in the course of psychotherapy?

2. Does California Evidence Code Section 1016 deny a patient in psychotherapy the equal protection of the laws by conditioning his access to the courts upon foregoing his constitutionally protected right of privacy?

STATUTORY PROVISION INVOLVED

California Evidence Code:

§ 1016. *Condition of Patient in Issue.*

There is no privilege under this article as to a communication relevant to an issue concerning the mental or emotional condition of the patient if such issue has been tendered by:

(a) The patient;

(b) Any party claiming through or under the patient;

(c) Any party claiming as a beneficiary of the patient through a contract to which the patient is or was a party; or

(d) The plaintiff in an action brought under Section 376 or 377 of the Code of Civil Procedure for damages for the injury or death of the patient.

STATEMENT OF THE CASE

Petitioner is a physician specializing in psychiatry. On March 4, 1974, respondent Superior Court of the State of California for Marin County, by the respondent Judge

Joseph G. Wilson, remitted petitioner to the custody of respondent Louis P. Mountanos, as Marin County Sheriff, after the Court had adjudicated him in civil contempt for failing to answer certain questions at a deposition. The deposition was taken in the course of discovery proceedings in a civil suit brought by one of petitioner's patients, Joan Seebach, in respondent court against the remaining respondents, Hans Van Boldrick and County of Marin, for injuries incurred in two automobile accidents. Petitioner had answered many questions about Miss Seebach at his deposition but refused to answer others on the grounds that to answer them would (1) adversely affect Miss Seebach's emotional condition which had been placed in his professional care, and (2) violate Miss Seebach's right to privacy protected by the Bill of Rights and under the Equal Protection and Due Process Clauses of the Fourteenth Amendment to the United States Constitution. The particular questions which petitioner refused to answer are set forth in the first footnote to the dissenting opinion below. Appendix, p. 16.

Petitioner sought appellate review in the California courts. A writ of certiorari was denied by the California Court of Appeal, and a hearing was denied by the California Supreme Court. Thereafter, he filed a petition for habeas corpus against the respondents in the United States District Court for the Northern District of California under 28 U.S.C. § 2254(a). The petition was denied in the district court, and the denial was affirmed by the Ninth Circuit Court of Appeals, Judge Hufstedler dissenting.

Pending this review, execution of the contempt sentence was stayed by the Superior Court. Dr. Caesar remains in constructive custody and has standing to raise the constitutional issues pertaining to his imminent incarceration. *Hensley v. Municipal Court*, 411 U.S. 345 (1973).

Joan Seebach had brought two suits, later consolidated, in the Marin County Superior Court for damages resulting from two automobile accidents. In her two complaints, Miss Seebach alleged emotional injuries, and she testified on deposition that "due to these accidents, my lifestyle has changed considerably."

After the two accidents she was referred by another physician to Dr. Caesar for psychiatric examination and treatment, and consulted him for psychotherapy approximately twenty times. She was also examined for trial purposes by a diagnostic psychiatrist, Dr. Hume, who then testified fully upon deposition. Dr. Hume stated that according to Miss Seebach, Dr. Caesar's treatment of her concerned "early childhood problems." Dr. Caesar "went back into her history to see if she had some unresolved problems from earlier stages of her life with which he could help her in dealing with the present."

Dr. Hume's deposition testimony contains a full exposition of Miss Seebach's emotional problems as they relate to the accidents, including the subjects of diagnosis, causation, severity and prognosis. It is thus sufficient for an evaluation and disposition of Miss Seebach's tort claims.

Dr. Caesar first refused to give any testimony about his treatment.[2] Later, under order of the Superior Court, he gave substantial testimony, including his diagnosis of Miss Seebach as moderately to severely depressed. He declined to answer other questions which, in his opinion, would "be so harmful as to constitute a serious breach of the ethics of my profession."[3] His refusal, which resulted in

2. His original grounds for refusal were the likelihood that "revealing her confidences would be harmful to her psychologically and detrimental to her future well-being," the absence of a valid consent and the fact that the questions were overbroad and would cause "unnecessary and unwarranted breaches of confidence."

3. See, e.g., Group For The Advancement Of Psychiatry, Report No. 45, *Confidentiality and Privileged Communication In The Practice Of Psychiatry*, pp. 97-98 (1960).

these proceedings, was based upon the constitutional claims here presented and the amplified grounds that to answer further "would violate the ethics of my profession • • • [t]he Hippocratic oath and what has been called the first principle of medicine, *primum non nocere*, which literally translated means first no harm."

Dr. Caesar further argued that he viewed "his position as a psychotherapist • • • as that of a healer in which his own personality and his own personal interaction with the patient are the tools of healing, and to force his personality to be put at a distance from the patient in any way in this manner would be to destroy the opportunity to be a healer." As Dr. Caesar explained at the contempt hearing:

> Unlike other physicians • • • the relationship between the patient and the [psychotherapist] cannot be separated from the treatment itself. • • • If a neurosurgeon must report his objective findings in a case, if this goes against his patient's interest, his relationship with the patient may suffer, but the physical treatment given the patient will not be affected, but, if a psychiatrist does the same thing, the treatment will be damaged, or destroyed, because the patient's trust in his doctor will be impaired by the disclosures, and this trust is an integral part of the therapeutic effect of the relationship on the patient.

As thus described by petitioner, the unique nature of the psychotherapeutic relationship underscores the constitutional dimension of petitioner's position.

REASONS FOR GRANTING THIS WRIT

Recent decisions of this Court[4] have held that the treatment relationship between a patient and his physician falls within the patient's zone of privacy secured by the Bill of

4. *Planned Parenthood of Central Missouri v. Danforth*, ... U.S. ..... (1976); *Bellotti v. Baird*, ... U.S. ..... (1976); *Roe v. Wade*, 410 U.S. 113 (1973); *Doe v. Bolton*, 410 U.S. 179 (1973); *Griswold v. Connecticut*, 381 U.S. 479 (1965).

Rights, particularly the first, fourth, fifth, ninth and fourteenth amendments to the United States Constitution. State laws which seek to penetrate that privacy and disturb that relationship "may be justified only by a 'compelling state interest,' [citations] and • • • must be narrowly drawn to express only the legitimate state interests at stake." *Roe v. Wade,* 410 U.S. 113, 155 (1973).

The important question of federal law presented by this petition is whether that constitutional test is met by California Evidence Code Section 1016, which, as this record reflects, compels destruction of the treatment confidentiality essential to psychotherapy. At least twenty-two states and the District of Columbia follow California's lead in compelling such intrusions,[5] making the question here presented one of national importance to psychiatry and its patients.[6]

5. Colo.Rev.Stats. (1973), § 13-90-107, *Kelley v. Homes,* 28 Colo.App. 79, 470 P.2d 590 (1970); Gen.Stats.Conn. (1972), § 52-146f(e), Dist.Col.Code, § 14-307, *United States v. Carr,* 437 F.2d 622 (D.C.Cir. 1970), *Calhoun v. Jacobs,* 141 F.2d 729 (D.C. Cir. 1944); Fla.Stats.Ann., § 90.242(3)(b), *Yoho v. Lindsley,* 248 S.2d 187 (Fla.App. 1971), Hawaii Rev.Stats., § 621-20.5(a); Idaho Code, § 9-203(4)(C); Ill.Rev.Stats., Ch. 51, § 5.2(e); Burns Ind. Stats.Ann., § 34-1-14-5, *Baker v. Whittaker,* 133 Ind.App. 347, 182 N.E.2d 442 (1962); Kan.Stats.Ann., § 60-427(d); La.Rev.Stats., § 478; Maine Rev.Stats.Ann., Title 32, § 3295, Ann.Code Maryland, Courts & Judicial Proceedings, § 9-109(e)(3); Ann.Laws Mass., Ch. 223, § 20B(e); Mich.Stats.Ann., § 27A.2157; Rev.Stats. Nebr., § 25-1207; Nev.Rev.Stats., § 49.245(3); N.J.Stats.Ann., § 2A:84A-22.4; N.M.Stats.Ann., Rules of Evidence, § 20-4-504(d)(3); N.Y. C.P.L.R., § 4504, *Koump v. Smith,* 25 N.Y.2d 287, 303 N.Y.S.2d 858, 250 N.E.2d 857 (1969), *Mancinelli v. Texas Eastern Transmission Corp.,* 34 A.D.2d 535, 308 N.Y.S.2d 882 (1970); Gen. Stats.N.C., §§ 8-53, 8-53.3; Ohio Rev.Code Ann., § 2317.02(B); Purdons Penn.Stats.Ann., Title 28, § 328, Code of Va., § 8-289.1.

6. This issue is not necessarily limited to the patient's right to privacy; it may also infringe upon the nascent constitutional right of the doctor to practice. This Court has acknowledged recently that state laws may not "unduly infringe • • • on the physician's right to practice", *Doe v. Bolton,* 410 U.S. 179, 199 (1973); see *Singleton v. Wulff,* ..... U.S. ..... (1976). As will be explained below, however, it need not turn on any absolute right of privacy, such as the Court of Appeals rejected. Rather, the statute at hand must fall because it exceeds the limit of permissible invasion into a constitutionally protected zone of privacy, where less intrusive alternatives clearly exist.

1. Section 1016 Is Too Broadly Drawn to Meet Constitutional Scrutiny.

The court below conceded the constitutional magnitude of the right of privacy inherent in the psychotherapeutic relationship. Appendix, pp. 7-8, 15-17. The Supreme Court of California concurs. *In re Lifschutz,* 2 Cal.3d 415 (1970); *Roberts v. Superior Court,* 9 Cal.3d 330 (1973). Indeed, given the other medical specialties and other social concerns which have been afforded constitutional protection by virtue of the right to privacy,[7] there can be no question that psychotherapy is particularly entitled to such protection. As the court below stated: "psychotherapy is perhaps more dependent on absolute confidentiality than other medical disciplines. • • • [There is a] 'justifiable expectation of confidentiality that most individuals seeking psychotherapeutic treatment harbor.'" Appendix, p. 7. The dissenting judge aptly added: "Psychotherapy probes the core of the patient's personality. The patient's most intimate thoughts and emotions are exposed during the course of the treatment. • • • [Those] thoughts may be so frightening, embarrassing, shameful or morbid that the patient in therapy will struggle to remain sick, rather than to reveal those thoughts even to himself. The possibility that the psychotherapist could be compelled to reveal those communications to anyone, let alone to broadcast them in a legal proceeding, can deter persons from seeking needed treatment and destroy treatment in progress." Appendix, p. 17.[8]

As noted, *supra* p. 6, where, as here, "fundamental rights" are involved, state limitations on such rights sur-

7. E.g., satisfying intellectual and emotional needs in one's home. *Stanley v. Georgia,* 394 U.S. 557 (1969).

8. Medical authorities are emphatic in finding confidentiality essential to psychotherapy. See, e.g., Group For The Advancement of Psychiatry, *supra* n. 3, pp. 92-93.

vive constitutional scrutiny only upon demonstration that they are based upon a "compelling state interest" and that they are "narrowly drawn to express only the legitimate state interests at stake." *Roe v. Wade, supra,* 410 U.S. at 155. Though it may be conceded in theory that, as noted by the Court of Appeals, "[t]he state has a compelling interest to insure that truth is ascertained in legal proceedings in its courts of law" (Appendix, p. 11), California's legislative scheme demonstrates that California itself does not view that interest as compelling in the constitutional sense. California allows broad exceptions to the proposition that all must fully testify. It has voluntarily foregone testimony, *inter alia,* from attorneys about their clients (California Evidence Code Sections 950-962), from spouses about each other (*ibid.,* Sections 970-973), from businessmen about trade secrets (*ibid.,* Section 1060), from newsmen (to a degree) about their sources (*ibid.,* Section 1070).[9] Since California has voluntarily declined to compel testimony from many potential witnesses, it cannot be said that its need to obtain testimony for ordinary civil litigation rises to the same constitutional rank as the right of privacy here examined. Cf. *United States v. Nixon,* 418 U.S. 683, 711 (1974).

But even if the state's interest were compelling, Section 1016 is not narrowly enough drawn to meet the *Roe v. Wade*

9. These exceptions follow the classic Wigmore formulation for privileges: the communication must originate in confidence; confidentiality must be essential; the relationship is one which should be fostered; and the injury resulting from disclosing the information must be greater than the benefit gained by disclosure. 8 Wigmore, *Evidence,* Section 2285 (McNaughton Rev. 1961). See also, further statutory privileges in Calif.Evid. Code, §§ 980-987 (confidential marital communications); §§ 990-1007 (physician-patient privilege); §§ 1030-1034 (clergyman-penitent privilege); §§ 1040-1042 (official information and informer identity); § 1050 (privilege of the ballot).

test. In *In re Lifschutz, supra,* the California Supreme Court attempted to save Section 1016, as against the same constitutional challenge as made here, by limiting disclosure to "*those mental conditions* the patient-litigant has 'disclose[d] • • • by bringing an action in which *they* [those mental conditions] are in issue' " and by holding that "communications which are not directly relevant to those specific conditions do not fall within the terms of Section 1016's exception and therefore remain privileged." 2 Cal.3d at 435; emphasis in text. Unfortunately, for the several reasons mentioned in the dissent below,[10] the *Lifschutz* formula "is almost impossible to apply" and, as applied, "impermissibly encroaches on the patient's zone of protected privacy." Appendix, p. 20.

The proposition that the legally impelled disclosure can be limited to "mental conditions • • • directly relevant" to the patient's claim afforded no guide to the Superior Court in this case. In practice, as both that court and the dissent below noted, the test for compulsory waiver under Section 1016 and *Lifschutz* requires a patient either to forego all claims for compensation of emotional injury or to relinquish all protection of his psychotherapeutic confidences. Appendix, pp. 21-22.

Furthermore, less intrusive means exist to achieve California's asserted interest in obtaining all relevant testimony in civil proceedings. Particularly appropriate is the

10. As Judge Hufstedler concisely states, *Lifschutz* fails because the court cannot determine what must be disclosed without forcing upon the claimant of the privilege the burden of proving the lack of relevance of the communication to the mental conditions in issue. Additionally, there is imposed on the patient a tripartite burden to diagnose his own illness, to determine the mental conditions at issue in the case, and to decide what evidence is "directly related" to these conditions. Finally, it improperly equates forced disclosure with voluntary waiver of the right of privacy. Appendix, p. 20-22.

very device used in the present case, i.e., the employment of a diagnostic psychiatrist.[11]

Nor can this constitutional violation be justified on the basis that the patient has voluntarily "waived" his right of privacy by placing his mental condition in issue. As the dissent below explained:

> The implication is that constitutional infirmities disappear because the patient waives his right of privacy when he seeks legal redress for his injury. There is nothing voluntary about the injury suffered. The injured patient "controls" the "intrusion" only in the sense that he can give up redress instead of seeking legal relief for the injury. If he seeks redress for his injury, relinquishment of his constitutionally protected zone of privacy is in no sense voluntary; Section 1016 compels him to choose between his privacy and his right to seek legal redress. That Hobson's choice is not a waiver; as California Evidence Code Section 912(a) acknowledges, a waiver of the privilege must be "without coercion." Appendix, pp. 22-23; fn. omitted.

The majority below also recognized this coercive effect of Section 1016, but found nothing wrong in the "hard choices" it imposes on litigant patients, while noting that the statute will "discourage" what may be valid suits. Appendix, p. 9. But California cannot require its people to make such "hard choices" between constitutional rights if, as is the case here, less intrusive ways of meeting the state's legitimate interests exist.

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11. The constitutional claim here is limited to psycho*therapy*, i.e., attempts to alleviate emotional illness through confidential verbal expressions from patient to therapist. Other branches of psychiatry such as diagnostics, hospital treatment, and forensic psychiatry, have different purposes or dynamics and are not encompassed in this claim.

2. Section 1016 Violates the Equal Protection Clause of the Fourteenth Amendment.

California Evidence Code Section 1016 fails to afford equal protection to the class of patient litigants in that (1) it conditions access to the courts upon waiver of the patient's constitutional right of privacy and (2) it denies patients who insist on privacy a meaningful opportunity to be heard.[12]

As this Court has long held, a state may not condition the right to a state-created benefit upon waiver of a constitutional right. *Sherbert v. Verner,* 374 U.S. 398 (1963). Thus, California may not constitutionally compel a patient to relinquish his constitutional right of privacy—a right essential to his medical health—in order to obtain access to California's courts. Yet, California Evidence Code Section 1016 impermissibly requires just such a waiver.

Additionally, this Court has held that " 'within the limits of practicability' • • • a state must afford all individuals a meaningful opportunity to be heard" in the courts. *Boddie v. Connecticut,* 401 U.S. 371, 379 (1971). The civil courts constitute the only existing social instrument for compelling the payment of damages for injuries where voluntary settlement is refused.[13] California Evidence Code Section 1016 as interpreted by the California Supreme Court in *In re Lifschutz, supra,* and by the court below, puts the patient to the insupportable choice of either foregoing his constitutional right of privacy or denying himself access to the courts for redress of emotional injuries.

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12. Indeed, the California Evidence Code violates both the Equal Protection Clause of the Fourteenth Amendment and the Establishment of Religion portion of the First Amendment by according absolute confidentiality to the priest-penitent relationship (Calif. Evid. Code, §§ 1030-1034) while qualifying the privilege in the equivalent lay context, the psychotherapist-patient relationship (Calif. Evid. Code, § 1016).

13. Contrast *Ortwein vs. Schwab,* 410 U.S. 656 (1973) and *United States v. Kras,* 409 U.S. 434 (1973) where *Boddie* was distinguished because alternative avenues of relief were available.

As the respondent Judge Wilson recognized, it is not "medically possible, particularly in the field of psychiatry where you deal pretty much with the whole person," to separate relevant from irrelevant psychotherapeutic communications. Thus, merely because she sought to recover damages for the "mild depression" she suffered as a result of two automobile accidents, Miss Seebach was required by Section 1016 to bare her entire psychiatric history, including Dr. Caesar's treatment of her "early childhood problems." The statutory requirement of such sweeping revelation of psychotherapeutic confidences substantially bars Miss Seebach and those like her from access to the courts. If such patients insist upon the confidentiality of such communications, they are denied the opportunity for a meaningful hearing of their claims.

CONCLUSION

Aware of the delicate problems involved in the question of medical privilege, Congress has expressly left development of that issue to the courts. Proposed Federal Rule of Evidence 504(d)(3) tracked the very exception to the physician-patient privilege at issue in this case. Due to widespread criticism[14] that such a rule would unduly interfere with needed confidentiality and with patients' expectations of privacy, the Congress ultimately eliminated the proposed rule and adopted in its place Rule 501 which reads:

> Except as otherwise required by the Constitution of the United States [or otherwise limited] • • •, the privilege of a witness • • • shall be governed by the

14. See Hearings on Proposed Rules of Evidence before the Special Subcom. on Reform of Federal Criminal Laws of the House Comm. on the Judiciary, 93rd Cong., 1st Sess. (1973); Senate Report No. 93-1277, 93rd Cong., 2nd Sess. (1974); 1974 U.S. Code, Cong. & Admin. News 7051, 7052-4.

> principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. • • •

The issues framed by this case are aptly summarized in the critique of proposed Rule 504 by Professor Charles L. Black of the Yale Law School:

> All of us would consider it indecent for a doctor, in the course, say, of a television interview, or even in a textbook, to tell all he knows, naming names, about patients who have been treated by him. Why does this judgment of decency altogether vanish from sight, sink to absolute zero, as soon as somebody files any kind of a non-demurrable complaint in a federal court? Here, again, can a rule be a good one when the ethical doctor *must* violate it, or hedge or evade?[15]

It is estimated that one out of ten persons in this country will at some time in his life suffer mental illness.[16] These persons and their physicians urgently need the guidance of this Court and its protection of the constitutional right of privacy here in issue.

Petitioner faces incarceration for his stand in maintaining the essential ethical mandate of his profession, that he not break the silence which is necessary for him to function as a healer. His position has a firm constitutional basis and should receive the protection of this Court. A writ of cer-

15. Hearings, *supra* n. 14, at Ser. 2, p. 242.

16. Commission on Chronic Illness, *Chronic Illness In The United States*, vol. 4 "Chronic Illness in a Large City: The Baltimore Study" (Harvard Univ. Press, 1957), p. 73, et seq., Pasamanick, B., "A Study of Mental Disease in an Urban Population: IV. An Approach to Total Prevalence Rates", 5 *Archives of General Psychiatry*, 151-155; Strole, L., et al., *Mental Health In The Metropolis: The Midtown Manhattan Study* (McGraw Hill, 1962.); Roth, W. F. and Luton, F. J., "The Mental Health Program in Tennessee", 99 *American Journal of Psychiatry*, 662-675 (1943).

tiorari should issue to review the judgment of the Ninth Circuit; the judgment should be reversed and the writ of habeas corpus directed to issue.

Respectfully submitted,

KURT W. MELCHIOR
One Embarcadero Center, 25th Floor
San Francisco, California 94111
Counsel for Petitioner

December 10, 1976.

SEVERSON, WERSON, BERKE & MELCHIOR
NICHOLAS S. FREUD
JAN T. CHILTON
Of Counsel

(Appendix Follows)

Appendix

Filed—Sep 13 1976
Emil E. Melfi, Jr.
Clerk, U.S. Court of Appeals

United States Court of Appeals
for the Ninth Circuit

No. 74-2271

George R. Caesar, M.D.,

Petitioner-Appellant,

vs.

Louis P. Mountanos, as Sheriff of the County of Marin, State of California; Superior Court of the State of California in and for the County of Marin: Honorable Joseph G. Wilson, as Judge of said Superior Court, Hans Van Boldrick and County of Marin,

Respondents-Appellees.

OPINION

Appeal from the United States District Court
for the Northern District of California

Before: Koelsch and Hufstedler, Circuit Judges, and Jameson,* District Judge.

Jameson, District Judge:

Petitioner, Dr. George R. Caesar, a licensed psychiatrist practicing in California, has appealed from an order deny-

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*Honorable W. J. Jameson, United States Senior District Judge for the District of Montana, sitting by designation.

ing his petition for a writ of habeas corpus seeking to set aside a contempt adjudication and sentence in the California Superior Court, Marin County.[1] He was adjudged in contempt for refusing to obey an order directing him to answer questions relating to communications with a former patient, based on a "patient-litigant exception" to the psychotherapist-patient privilege, contained in California Evidence Code § 1016.[2] Petitioner contends that § 1016 violates "rights of privacy, due process and equal protection which exist under the Constitution of the United States".[3] In a detailed and well reasoned opinion the Supreme Court of California rejected this contention in *In Re Lifschutz,* 467 P.2d 557, 44 A.L.R. 3d 1 (1970), and upheld the validity of § 1016. We agree with the conclusions of the court in *In Re Lifschutz* and affirm the order of the district court.

Background

In December 1969, Joan Seebach was referred to Dr. Caesar for psychiatric examination and treatment following an automobile accident on December 4, 1969. Dr. Caesar saw her approximately 20 times for psychotherapy. Miss Seebach had been in another automobile accident on August

1. Commitment was stayed pending appellate review in the California and Federal courts. A writ of certiorari was denied by the California Court of Appeals, First Appellate District, Division Four, and a hearing was denied by the Supreme Court of California.

2. § 1016 relating to "Patient-litigant exception" reads in pertinent part:

"1016. There is no privilege under this article as to a communication relevant to an issue concerning the mental or emotional condition of the patient if such issue has been tendered by:

(a) The patient;"

3. The California State Psychological Association has filed an amicus curiae brief in support of petitioner's position.

30, 1968. She filed separate actions to recover damages for both accidents in July and August, 1970. In her complaints Miss Seebach alleged that the accidents caused her personal injury and pain and suffering not limited to her physical ailments. She alleged further that she had incurred medical expenses and loss of income in amounts not fully ascertainable at that time. In a deposition in one of the cases, taken on June 15, 1971, Miss Seebach and her counsel indicated that "some of the care and treatment" given by Dr. Caesar "may be involved in this lawsuit".[4] Another psychiatrist in a deposition testified that Miss Seebach's attending physicians had recommended referral to Dr. Caesar because they felt there was "an emotional overlay" to her problems and that she was "magnifying her distress".[5]

The two actions were consolidated for trial, and Dr. Caesar's deposition was taken on April 5, 1972. He testified that he had given his notes on Miss Seebach to her counsel. He refused to answer any questions regarding his treatment of Miss Seebach, stating that in his judgment "answering further questions and revealing her confidences could be harmful to her psychologically, and detrimental to her future well-being". Caesar indicated that he had not received "valid consent" from Miss Seebach which would permit him to testify. Counsel for Miss Seebach then told Caesar that she was no longer his patient and that although there had been some prior confusion about Miss Seebach's

4. Counsel for Miss Seebach stated that his client had been referred to Dr. Caesar because her attending physician felt that her condition might be the result of a conversion reaction or depressive reaction, and that there was some difference of opinion between some of the treating physicians and Miss Seebach and her counsel. Miss Seebach then said, "You have to see the total picture, because due to these accidents, my life style has changed considerably".

5. The psychiatrist said further that she understood that Dr. Caesar had traced some of Miss Seebach's emotional problems to her early childhood.

consent, she had authorized counsel to stipulate that consent for Caesar to testify had been given. Caesar refused to accept this consent and stated further that even if written consent were given he would still refuse to testify. Subsequently, Miss Seebach filed a notice revoking her waiver of the psychotherapist-patient privilege.

Following a hearing an order was entered in the Marin County Superior Court on October 18, 1972 requiring Dr. Caesar to give his deposition. The court held that under § 1016, as construed in *In Re Lifschutz,* Miss Seebach had waived the psychotherapist-patient privilege when she placed her "mental or emotional condition" in issue by "claiming damages for mental and emotional distress". At a second deposition on November 27, 1972 Dr. Caesar acknowledged that he had treated Miss Seebach for injuries she had sustained in the accidents and that he had diagnosed her condition as depressed. He refused, however, to answer eleven questions concerning the relationship of her emotional condition to the accidents. The contempt order followed on December 12, 1972.[6] After petitioner had exhausted his state court remedies, he sought relief in federal court. In denying his petition, the district court held that § 1016 was not unconstitutional, did not invade any rights of privacy of petitioner or his patient, and that the contentions of petitioner should be addressed to the State Legislature rather than the courts.

Contentions on Appeal

Under California Evidence Code § 1014 a psychotherapeutic patient has the privilege to refuse to disclose and to prevent others from disclosing confidential communications

6. The order of the Superior Court required Caesar to answer only those questions which he refused to answer at the November 27 deposition.

between the patient and doctor. § 1015 allows the psychotherapist to claim the privilege of his patient when information about a confidential communication is sought. However, as noted *supra,* § 1016 provides, "There is no privilege under this article as to communications relevant to an issue concerning the mental or emotional condition of the patient if such an issue has been tendered by: (a) The patient . . ."

In attacking the validity of § 1016, petitioner contends that (1) there is an absolute constitutional protection for communications between patients and their psychotherapists of the type sought from Dr. Caesar, based on the right of privacy; (2) § 1016 violates the Equal Protection Clause of the Fourteenth Amendment in that (a) psychotherapeutic patients are deprived of rights afforded other litigants, and (b) § 1016 "discriminates unreasonably between those who seek out psychotherapists and those who seek out clergymen for the relief of emotional distress"; and (3) § 1016 is unjustified by any compelling state interest and is not narrowly drawn to express only the legitimate state interest at stake. Virtually all of these issues were considered in *Lifschutz.* It is contended, however, that the California court reached the wrong result in *Lifschutz* and that its decision "cannot withstand more current constitutional scrutiny", particularly in the light of the broader reach of doctor-patient privacy recognized in *Roe v. Wade,* 410 U.S. 113, and *Doe v. Bolton,* 410 U.S. 170 (1973).

The Lifschutz Decision

Lifschutz, a psychiatrist, was placed in custody for refusing to obey a discovery order issued by a trial judge pursuant to California Evidence Code § 1016. In *Lifschutz,* as here, the patient had tendered his mental and emotional condition in issue in a lawsuit, thus activating a waiver of

the psychotherapist-patient privilege under the statute. The California Supreme Court denied Lifschutz's petition for habeas corpus, holding that the federal constitution did not establish an absolute privilege for psychotherapeutic communications. The court construed § 1016 to require disclosure only of information directly pertinent to issues raised by the patient in a lawsuit and held that in applying the section, the psychotherapeutic privilege should be liberally construed in favor of the patient. When so limited, the court found that the statute did not constitute an impermissible invasion into the sphere of privacy encompassing the doctor-patient relationship in light of the various interests which must be balanced.[7]

Absolute Privilege

Petitioner relies, as did Dr. Lifschutz, on the fundamental right of privacy encompassing the doctor-patient relationship. This right of privacy, the psychotherapists contend, must be construed to provide an absolute privilege for psychotherapeutic communications because of the nature of the relationship, depending, as it does, on the patient's complete confidence in the psychotherapist.[8] The *Lifschutz* court found this argument to raise serious and meritorious issues. The court held, however, that *Griswold v. Connecticut*, 381

7. Under a different factual situation the Supreme Court of California reaffirmed its conclusion in *Lifschutz* in *Tarasoff v. Regents of University of California*, 529 P.2d 553 (in banc, 1974). In *Tarasoff* the court construed California Evidence Code § 1024, involving another exception to the psychotherapist-patient privilege. Two members of the court dissented.

8. Petitioner's claim "is limited to protection against compelled disclosures in the course of civil proceedings of psychotherapeutically obtained communications". It does not involve a claim of absolute confidentiality in the context of a patient's apparent propensity to violence (see *Tarasoff v. Regents*, n. 6), nor the right to compel disclosure in criminal proceedings.

U.S. 479 (1965), the leading decision on doctor-patient rights at the time *Lifschutz* was decided, did not prohibit all state interference in the doctor-patient relationship but instead left room for some state regulation. The *Lifschutz* court recognized, as we do, that psychotherapy is perhaps more dependent on absolute confidentiality than other medical disciplines. In interpreting § 1016 the court was "mindful of the justifiable expectation of confidentiality that most individuals seeking psychotherapeutic treatment harbor". 467 P.2d at 567. The court noted, however, that psychotherapy had not been destroyed but rather had flourished in the face of § 1016 and similar statutes which establish less than absolute psychotherapist-patient privilege. The court concluded that the constitution does not provide psychotherapists with an absolute right of privacy but permits limited instrusion into the psychotherapist-patient privilege when properly justified.

Petitioner contends that because the court in *Lifschutz* did not have the benefit of the more recent analysis of the doctor-patient relationship in *Roe v. Wade, supra,* and *Doe v. Bolton, supra,* the *Lifschutz* opinion is subject to reexamination and correction.[9] We disagree. Both the *Roe* and *Doe* decisions spoke of and relied upon a conditional right of privacy in the doctor-patient relationship. As the Court in *Roe*, 410 U.S. at 153-54, noted after reviewing a long line of privacy cases, "The Court's decisions recognizing a right of privacy also acknowledge that some state regulation in areas protected by that right is appropriate." *Roe* held that interference with the doctor-patient relation-

9. We agree, as did the court in *Lifschutz*, that the right of privacy encompassing the doctor patient relationship identified and explained in *Griswold*, *Roe* and *Doe* goes beyond the factual context of those cases, i.e., intimate marital and sexual problems, and extends to psychotherapist-patient communications. The question is whether that right is absolute.

ship could be justified upon the showing of a "compelling state interest". *Roe,* 410 U.S. at 163. Similarly the court in *Lifschutz* recognized that it was dealing with a qualified right which could be infringed upon a showing of an "important state interest". The analytical methodology followed by *Lifschutz* is essentially the same as that followed in *Roe* and *Doe* and may be properly applied here. We have no doubt that the right of privacy relied on by Dr. Caesar is substantial. However, the right is conditional rather than absolute and limited impairment of that right may be allowed if properly justified.[10]

Violation of Equal Protection Clause

Petitioner argues that § 1016 conflicts with the Equal Protection Clause in two ways: (1) by placing a precondition on psychotherapeutic patients' access to the courts, § 1016 deprives them of rights afforded other litigants; and (2) by establishing an absolute privilege for clergymanpenitent communications in § 1034, the State impermissibly discriminates between those who seek clergymen for counseling and those who consult psychotherapists. We find that both contentions were adequately considered and correctly dealt with in *Lifschutz.*

The court in *Lifschutz* noted that § 1016 neither contemplates a complete waiver of the psychotherapeutic communication privilege nor seeks to deter psychotherapy patients from instituting lawsuits. As construed in *Lifschutz,* disclosure is strictly limited to that information placed in issue by the plaintiff himself and about which he and his psychotherapist have practically exclusive knowl-

10. Petitioner also relies on *Roe v. Ingraham,* 480 F.2d 102 (2 Cir. 1973). *Ingraham,* however, applied the same balancing test as utilized in *Roe v. Wade, supra,* and held that while prescription records fall within the area protected by the right of privacy, that right is not absolute and may be subject to state regulation. 480 F.2d at 108.

edge.[11] Although the effect of the section may be to require litigants to make some hard choices before bringing a lawsuit and may in fact discourage some legal actions, a state may place formal and procedural requisites on litigants without violating their constitutional rights to judicial process as long as the state's action is based upon a proper consideration of the nature of the proceedings and interests involved. See, *Boddie v. Connecticut,* 401 U.S. 371, 377-378 (1971).[12] Every person who brings a lawsuit under our system of jurisprudence must bear disclosure of those facts upon which his claim is based. Section 1016, rather than discriminating improperly against psychotherapy patients, instead places them on the same footing as other litigants.

Concerning the difference between the privileges granted clergymen and psychotherapists, the *Lifschutz* court concluded that the distinction did not render the California statutes unconstitutional. The court noted that each of the evidentiary privileges recognized by law is subject to different exceptions based upon the nature of the relationships involved.[13] The attorney-client privilege is subject to exception in several instances, as, for example, when a lawyer

11. As we note *infra,* we doubt that having the patient-litigant referred to another psychotherapist for diagnostic examination can substitute for the information the treating psychotherapist can provide about the patient.

12. *Boddie* held that a state could not impose court filing fees which had the effect of discriminating against litigants on the basis of wealth, stating that " 'within the limits of practicability' . . . a State must afford to all individuals a meaningful opportunity to be heard". 401 U.S. at 379. Here neither the patient nor petitioner has been deprived of a meaningful hearing.

13. Under the common law a person was required to give testimony upon all facts inquired of in a court of law and few, if any testimonial privileges were allowed. Those privileges which have developed are based upon the existence of four fundamental conditions: (1) the communication must originate in confidence; (2) confidentiality must be essential; (3) the confidential relationship

is contacted by the client for criminal purposes or where an issue of the lawyer's duty to his client is raised. Calif. Evid. Code §§ 956-962. The marital communication privilege is inapplicable where one spouse injures another or in actions for alienation of affections. Calif. Evid. Code §§ 972, 981-986. The physician-patient privilege, like the psychotherapist patient privilege, is not applicable where the patient places his physical condition at issue in a lawsuit. Calif. Evid. Code § 996. Each of these exceptions to the general grant of evidentiary privilege has been created by the State Legislature in an effort to accommodate and balance the various interests involved. See 8 Wigmore, Evidence § 2285, *et seq.*, (McNaughton Rev. 1961). The clergyman-penitent privilege was recognized in *Lifschutz* as being a necessary "accommodation by the secular state to strongly held religious tenets of a large segment of its citizenry". 467 P.2d at 565. This need for accommodation, coupled with the difference between the nature of the services performed by clergymen and psychotherapists, can warrant the Legislature's decision to treat the two professions differently.

Like the court in *Lifschutz* we decline to pass on the question of whether the accommodation granted by § 1034 can be reconciled with the Establishment Clause. Petitioner has standing only to raise issues with respect to the constitutionality of § 1016. That section is not invalid because it fails to grant psychotherapists the same privileges granted clergymen and members of other learned professions.

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must be one which ought to be fostered; and (4) the injury resulting from disclosing the information must be greater than the benefit gained by disclosure. 8 Wigmore, Evidence § 2285 (McNaughton Rev. 1961). Wigmore raises serious doubts about the existence of the fourth element with regard to patient-physician communications.

Compelling State Interest

Where "fundamental rights" are involved, "regulation limiting these rights may be justified only by a 'compelling state interest'," and "legislative enactments must be narrowly drawn to express only the legitimate state interests at stake". *Roe v. Wade,* 410 U.S. at 155. Petitioner contends that there is no demonstrable compelling interest to support § 1016 and it is, therefore, constitutionally invalid. We disagree. As Mr. Justice White stated in his concurring opinion in *Murphy v. Waterfront Comm'n,* 378 U.S. 52, 93-94 (1964):

> "Among the necessary and most important of the powers of the states as well as the Federal Government to assure the effective functioning of government in an ordered society is the broad power to compel residents to testify in court or before grand juries or agencies. See *Blair v. United States,* 250 U.S. 273 (1919). Such testimony constitutes one of the Government's primary sources of information."

The state has a compelling interest to insure that truth is ascertained in legal proceedings in its courts of law. This interest has been held to be sufficient to require newsmen to testify before grand juries concerning privileged information, *Branzburg v. Hayes,* 408 U.S. 665 (1972), to compel testimony from witnesses invoking the Fifth Amendment privilege against self-incrimination once immunity has been given, *Kastigar v. United States,* 406 U.S. 441 (1972), and to require witnesses before grand juries to testify concerning illegally obtained evidence, *United States v. Calandra,* 414 U.S. 338 (1974). California's interest in requiring psychotherapists to produce limited disclosure of confidential communications is adequately supported by a compelling interest under current constitutional standards.

Is Section 1016 "Narrowly Drawn"?

In *Lifschutz,* the court rejected the broad effect of § 1016 urged by petitioner and concluded that the section "must be construed not as a complete waiver of the privilege but only as a limited waiver concomitant with the purposes of the exception". The court continued: "Under section 1016 disclosure can be compelled only with respect to *those mental conditions* the patient-litigant has 'disclose[d] . . . by bringing an action in which *they* are at issue' (*City & County of San Francisco v. Superior Court,* supra, 37 Cal. 2d 227, 231 P.2d 26 (1951); communications which are not directly relevant to those specific conditions do not fall within the terms of section 1016's exception and therefore remain privileged". 467 P.2d at 570.[14]

The court in *Lifschutz* noted also that California Code of Civil Procedure, § 2019(b) grants the trial court broad discretion to issue protective orders which justice requires to protect the party and witness, and that, "as with any evidence, the court retains discretion to 'exclude evidence if its probative value is substantially outweighed by 'he probability that its admission will . . . (b) create substantial danger of undue prejudice, . . .' (Evid. Code, § 352)" 467 P.2d at 572. These safeguards and the express limitation in the statute itself afford protection for both the patient and psychotherapist sufficient to withstand a constitutional attack.

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14. The court said further: "Disclosure cannot be compelled with respect to other aspects of the patient-litigant's personality even though they may, in some sense, be 'relevant' to the substantive issues of litigation. The patient thus is not obligated to sacrifice all privacy to seek redress for a specific mental or emotional injury; the scope of the inquiry permitted depends upon the nature of the injuries which the patient-litigant himself has brought before the court."

Miss Seebach has clearly raised before the court the issue "concerning [her] mental and emotional condition" and is seeking damages for mental and emotional injuries resulting from the accidents. She was examined and treated by Dr. Caesar for emotional distress and depression following the second accident. He testified that he had an opinion "with respect to whether Miss Seebach suffered from any emotional distress of any kind as a result of her having been in the two accidents", but he declined to state what the opinion was. The eleven questions Dr. Caesar declined to answer all related directly to his opinion regarding whether Miss Seebach suffered emotional distress or depression from the accidents, whether any condition Dr. Caesar found was the result of a combination of the accidents and other factors in her life, and whether the psychological factors he found played a role in the origin or aggravation of the cervical pain which Miss Seebach testified she was suffering from. The questions were all clearly relevant and related directly to the issue of her mental and emotional condition which Miss Seebach herself had raised. Although Miss Seebach later consulted another psychiatrist for diagnosis prior to trial, the new psychiatrist obviously could not substitute for the treating psychotherapist since she was unable to testify with respect to Miss Seebach's condition when she was examined by Dr. Caesar or any change in condition during the rather extended period of psychotherapy.

Conclusion

We conclude that under prevailing constitutional standards § 1016 as interpreted by the Supreme Court of California in *Lifschutz* strikes a proper balance between the conditional right of privacy encompassing the psychotherapist-patient relationship and the state's compelling need

to insure the ascertainment of the truth in court proceedings. The plaintiff has placed her mental and emotional condition in issue. By raising this issue she herself has breached the confidential relationship and made her emotional problems known to the public. Having so acted, the patient and her psychiatrist should not now be permitted to rely upon an absolute privilege which would preclude a proper determination of the truth of the plaintiff-patient's allegations. The disclosure required by § 1016 is mandated in the interests of a fair adjudication of the issues raised.

The judgment of the district court denying the petition for habeas corpus is affirmed.

Caesar v. Mountanos—No. 74-2271

HUFSTEDLER, Circuit Judge, concurring and dissenting:

I part company with *In re Lifschutz* (1970) 2 Cal.3d 415, 85 Cal. Rptr. 829, and hence with the majority opinion in this case, only in the holding that California Evidence Code Section 1016, as construed in *Lifschutz* and applied here, does not impermissibly encroach upon the patient's constitutional right of privacy. *Lifschutz* incorrectly assessed the weight of the patient's right of privacy as against competing public and private interests in the production of relevant evidence in personal injury litigation; the means adopted in *Lifschutz* to ameliorate the impact of Section 1016 upon the patient's right of privacy are not sufficiently sensitive to withstand constitutional scrutiny.

Section 1016 provides that "[t]here is no privilege under this article as to a communication relevant to an issue concerning the mental or emotional condition of the patient if such issue has been tendered by (a) [t]he patient . . . ." "Confidential communication" is defined in Section 1012 as "information, including information obtained by an examination of the patient, transmitted between a patient and his psychotherapist in the course of that relationship and in confidence by a means which, so far as the patient is aware, discloses the information to no third persons . . ., and includes advice given by the psychotherapist in the course of that relationship." As construed in *Lifschutz,* "communications between patient and psychotherapist, diagnosis by the psychotherapist, and advice given during the therapy relationship [are] privileged communications." (*Id.* 2 Cal. 3d at 429-30, 85 Cal. Rptr. at 838.) The questions that Dr.

Caesar refused to answer all fall within the privileged communications ambit.[1]

Lifschutz recognized that the psychotherapeutic patient's interest in keeping secret confidential communication with

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1. 1. "Did he [Dr. Klemme] say why, in his opinion it [a talk with Dr. Caesar] might be helpful to her.
2. [A]t the last time or at the occasion of your last consultation with her, would you describe her mental condition as being one of mild depression pertaining to the—or as a result of the physicial injuries which she says that she was suffering from as a result of the three accidents which I previously referred to?
3. Would you please stave what that opinion is, Doctor? [With respect to whether Miss Seebach suffered from any emotional distress of any kind as a result of her having been in those two accidents.]
4. [D]id you notice an improvement with respect to the degree of her depression over the period of time that she was under your treatment?
5. [A]re you able, Doctor, to relate the condition which you've described concerning the state of Miss Seebach's depression or the degree of Miss Seebach's depression at the time of your initial two interviews to any particular trauma or incident that may have occurred in her life?
6. Do you have an opinion as to whether or not the depression which you've described that existed at the time of your initial two interviews related to trauma that Miss Seebach suffered as a result of the two accidents in which she was involved, that you now recall?
7. Will you state what that opinion is?
8. [D]id you form an opinion immediately subsequent to your initial two interviews with Miss Seebach at the hospital concerning any emotional distress which she might have been suffering from which directly related to the two accidents which we've previously referred to in which she was involved?
9. Doctor, did you, during the course of your treatment of Miss Seebach—and by 'course,' I mean all of your interviews and consultations with her—form any opinion that her condition, mental or emotional condition, did not, in any way, relate to the accident in which she was involved and which you have knowledge of?
10. . . . whether the state of depression was a result of the combination of the accidents in which she was involved which you now recall and other factors in her life?
11. After the letter, [to another doctor which said he could not say whether psychological factors played a role in the back pain] did you form an opinion as to whether or not psychological factors played a role in the origin or aggravation of the cervical pain which Miss Seebach said that she was suffering from?"

his therapist "has deeper roots than the California statute and draws sustenance from our constitutional heritage. In Griswold v. Connecticut . . ., the United States Supreme Court declared that 'Various guarantees [of the Bill of Rights] create zones of privacy,' and we believe that the confidentiality of the psychotherapeutic session falls within one such zone." (*In re Lifschutz, supra,* 2 Cal.3d at 431-32, 85 Cal. Rptr. at 839.) The confidential communications between a psychotherapeutic patient and his doctor have the indicia to place those communications squarely within the constitutional right of privacy. Psychotherapy probes the core of the patient's personality. The patient's most intimate thoughts and emotions are exposed during the course of the treatment. " 'The psychiatric patient confides [in his therapist] more utterly than anyone else in the world . . . . [H]e lays bare his entire self, his dreams, his fantasies, his sin, and his shame.' " (*Taylor v. United States* (D.C. Cir. 1955) 222 F.2d 398, 401, *quoting* Guttmacher and Weinhofen, Psychiatry and the Law 272 (1952).) The patient's innermost thoughts may be so frightening, embarrassing, shameful or morbid that the patient in therapy will struggle to remain sick, rather than to reveal those thoughts even to himself. The possibility that the psychotherapist could be compelled to reveal those communications to anyone, let alone to broadcast them in a legal proceeding, can deter persons from seeking needed treatment and destroy treatment in progress. (*See, e.g., Taylor v. United States, supra;* J. Katz, J. Goldstein, & A. Dershowitz, Psychotherapy, Psychoanalysis and the Law 726-27 (1967).)

The Supreme Court has severely restricted state intrusion into zones of privacy that have one or more of these elements that inhere in the treatment relationship between the patient and his psychotherapist. (*E.g., Planned Parent-*

hood of Central Missouri v. Danforth (1976) .... U.S. .... [44 U.S.L.W. 5197] (right to privacy in the physician-patient relationship in the context of woman patient's decision to have an abortion without parental or spousal consent); *Doe v. Bolton* (1973) 410 U.S. 179 (the right of personal and marital privacy; privacy in the physician-patient relationship; privacy in human sexuality in the abortion setting); *Roe v. Wade* (1973) 410 U.S. 113 (similar to *Doe*); *Eisenstadt v. Baird* (1972) 405 U.S. 438 (privacy in human sexual relations; prohibition on contraception; state interest in health.) *See also, Stanley v. Georgia* (1969) 394 U.S. 557, 565 (fundamental right to satisfy intellectual and emotional needs in the privacy of one's home); *United States v. Twelve 200-Ft. Reels of Super 8MM Film* (1973) 413 U.S. 123, 127, n.4; (spheres of constitutionally protected privacy encompass "the intimate medical problems of family, marriage, and motherhood"); *Poe v. Ullmann* (1961) 367 U.S. 497, 538, 552 (Harlan, J. dissenting) (state interference in sexual conduct of married couples held intolerable invasion of privacy).) Communications between a patient and his or her psychotherapist often involve intimate medical problems of family, marriage, motherhood and fatherhood, human sexuality, and almost always concern strong emotional needs of the patient.

This sensitive zone of privacy is protetcted as a fundamental constitutional right.[2] Although the right is not absolute, it enters the combat zone heavily armed. It will

2. *Lifschutz* did not address the question whether confidential communications within the protection of a constitutional right of privacy were "fundamental" or whether the patient's right could be overcome by interests less weighty than "compelling." One explanation is that the court did not have the benefit of the post-*Griswold* decisions. Another factor was that the particular questions that Dr. Lifschutz refused to answer were only preliminary and did not reach the critical zone of privacy constitutionally protected. "The questions posed to Dr. Lifschutz, however, have inquired only into whether he treated [the patient-plaintiff], and whether he possessed records regarding this patient. Defendant has not yet asked Dr. Lifschutz about the nature of his treatment of the plaintiff, his diagnosis, or the content of any communication." (*Id.* 2 Cal.2d at 430, 85 Cal. Rptr. at 839.)

yield only to a compelling state interest, and then will give ground only to the extent necessary to protect a compelling adverse interest. (*E.g., Planned Parenthood of Central Missouri v. Danforth, supra; Roe v. Wade, supra,* 410 U.S. at 163, 164. *See also Friendship Medical Ct. Ltd. v. Chicago Board of Health* (7th Cir. 1974) 505 F.2d 1141; *Word v. Poelker* (8th Cir. 1974) 495 F.2d 1349; *Roe v. Ingraham* (S.D. N.Y. 1975) 403 F. Supp. 931, *prob. juris. noted sub nom., Roe v. Whalen* (1976) ..... U.S. ..... [44 U.S.L.W. 3471]. *Cf. Runyan v. McCrary* (1976) .... U.S. .... [44 U.S.L.W. 5034]; *Yoder v. Wisconsin* (1973) 406 U.S. 205; *Meyer v. Nebraska* (1923) 262 U.S. 390.)

The contest is not simply between the state's interest in "facilitating the ascertainment of truth in connection with legal proceedings" (*In re Lifschutz, supra,* 2 Cal.2d at 432, 85 Cal. Rptr. at 840) and the patient's interest in protecting his privacy. If it were, the patient's interest in his privacy would easily prevail over the state's general interest in the production of relevant evidence in a routine personal injury case. The public and private interests that are involved are more complex. The state is interested in effective access to the courts and in fair trials with respect to both plaintiffs and defendants in civil litigation. On the patient-plaintiff's side, the state also has interests in the deterrent effect of civil litigation upon potential tortfeasors, in the health of its citizens, and in the protection

of privacy of its citizens.[3] The economic interests of the plaintiff and defendant are also at stake.

The privilege sections of the California Evidence Code, including Section 1016, attempt to strike an appropriate balance between these competing interests. *Lifschutz* recognized that Section 1016 was not finely enough tuned to give adequate protection to the patient's right to protect his confidential communications. The court tried to avoid constitutional difficulties with Section 1016 by construing it "not as a complete waiver of the privilege but only as a limited waiver concomitant with the purposes of the exception. Under section 1016 disclosure can be compelled only with respect to *those mental conditions* the patient-litigant has 'disclose[d] . . . by bringing an action in which *they* are in issue' . . .; communications which are not directly relevant to those specific conditions do not fall within the terms of section 1016's exception and therefore remain privileged." (Emphasis in original. *Id.* 2 Cal. 3d at 435, 85 Cal. Rptr. at 842.) The problem is that this formulation is almost impossible to apply, and, to the extent that it can be sufficiently refined to be able to apply it, the relevance test impermissibly encroaches on the patient's zone of protected privacy.

The court in *Lifschutz* ran into immediate trouble trying to apply its test to Lifschutz. The plaintiff's complaint

3. The state as well as the individual has an interest in preserving the constitutional right of privacy. Any society that is unable to preserve to its members the autonomy of their personalities cannot long endure. A free society cannot exist at all without according substantial protection to the privacy of its citizens. (*E.g.*, Boyd v. United States (1886) 116 U.S. 616, 630; Olmstead v. United States (1928) 277 U.S. 438, 464-65, 478-79 (Holmes & Brandeis, J. J. dissenting). A. Westin, Privacy and Freedom 8-63, 330-38 (1st ed. 1967); Fried, "Privacy," 77 Yale L. J. 475 (1968).)

there, as here, contained the typical allegations of "mental and emotional distress" arising from the tort and did not "specifically identify the nature of the 'mental or emotional condition' at issue." (*Id.* 2 Cal.3d at 436, 85 Cal. Rptr. at 843.) The court confessed that it could not tell whether the ten-year old therapeutic treatment involved had any relevance, direct or not, to the mental conditions in issue. The court then shifted the burden to the plaintiff-patient to extricate himself from this dilemma by requiring "the patient initially to submit some showing that a given confidential communication is not directly related to the issue he has tendered to the court." (*Id.* 2 Cal.3d at 436, 85 Cal. Rptr. at 843.) This will not do.

The layman-patient simply cannot be expected to diagnose his own illness, to determine for himself what mental conditions are in issue in the lawsuit, or to decide what evidence is or is not "directly" related to the issue. Even a medically trained patient turned personal injury lawyer would be hard pressed in territory less slippery than mental health to prove the negative *Lifschutz* imposes upon him.

Moreover, as *Lifschutz* expressly and impliedly acknowledges, the patient must disclose at least part of the contents of the protected communications to his lawyer and to the trial judge as a condition to retaining the confidentiality of the communication. Disclosure of matters within the constitutionally protected zone is thus compelled by Evidence Code Section 1016, as construed in *Lifschutz*, as a condition to the patient's access to the court in seeking redress for his or her injuries in any case in which his or her mental condition is arguably in issue. In routine personal injury cases, like that asserted by Dr. Caesar's

patient, the plaintiff-patient must forego any potential recovery for emotional or mental distress (and possibly for pain and suffering, which have at least some mental elements[4]) to protect the confidentiality of communications to his or her psychotherapeutic doctor. In other cases, such as those based on intentional infliction of emotional distress, the plaintiff-patient must abandon any claim for redress because emotional distress is both an essential element of the tort and the primary, and often the sole damage suffered.

Lifschutz says that the compulsion imposed by Section 1016 is justified because "the patient's own action initiates the exposure" and the " 'intrusion' into a patient's privacy remains essentially under the patient's control." (2 Cal.3d at 433, 85 Cal. Rptr. at 840.) The implication is that constitutional infirmities disappear because the patient waives his right of privacy when he seeks legal redress for his injury. There is nothing voluntary about the injury suffered. The injured patient "controls" the "intrusion" only in the sense that he can give up redress instead of seeking legal relief for the injury. If he seeks redress for his injury, relinquishment of his constitutionally protected zone of privacy is in no sense voluntary; Section 1016 compels him to choose between his privacy and his right to seek legal redress. That Hobson's choice is not a waiver; as

4. *E.g.*, Roberts v. Superior Court of Butte County (1973) 9 Cal.3d 330, 107 Cal. Rptr. 309. The California Supreme Court upheld an attempted limitation on mental condition. The plaintiff alleged that she was "sick, sore, lame and disabled," but she did not allege an emotional distress claim to the extent that her psychiatrist had to testify, even though "sore" and "disabled" might have emotional connotations. Roberts thereby avoided airing her severe emotional problems, but simultaneously forfeited any recovery for emotional trauma due to the alleged tort.

California Evidence Code Section 912(a) acknowledges, a waiver of the privilege must be "without coercion."[5]

In short, the *Liftschutz*' effort effectively to narrow Section 1016 is a failure. Although no formula in this context will be completely successful, I propose means for restricting Section 1016 which, I believe, more adequately protect the patient's privacy right without unduly curbing a civil defendant's access to evidence. As applied to civil personal injury litigation, I would restrict the concept of relevance used in Section 1016 ("There is no privilege under this article as to a communication relevant to an issue concerning the mental or emotional condition of the patient if such issue has been tendered by: (a) the patient . . . .") as follows: No confidential communication between a psychotherapeutic patient and his treating doctor shall be deemed relevant for the purpose of Section 1016, except the fact of treatment, the time and length of treatment, the cost of treatment, and the ultimate diagnosis, unless the party seeking

5. Dr. Caesar and the majority have each advanced waiver theories. The majority says that putting in a claim for pain and suffering waives the right to privacy in respect of information relevant thereto. Dr. Caesar counters that it is impermissible to force Seebach to either "delimit" her claim, or waive her privacy right. Neither argument resolves the dilemma, because the issue is not whether there is any waiver at all, but the extent of the waiver; *i.e.*, the mechanics of deciding what is relevant. In addition, even if Boddie v. Connecticut (1971) 401 U.S. 371 equips Seebach with a due process right of access to the courts (*see* Wiren v. Eide (9th Cir. 1976) .... F.2d .... [slip op'n (June 22, 1976)]), a dubious proposition (Ortwein v. Schwab (1973) 410 U.S. 656; United States v. Kras (1973) 409 U.S. 434; Ad Hoc Comm. on Jud. Admin. v. Massachusetts (1st Cir. 1973) 488 F.2d 1241, 1244 n. 3.) it is juxtaposed against the defendants' equally insistent due process right to maximum relevant evidence. (*Cf.* United States v. Nixon (1974) 418 U.S. 683, 711.) Dr. Caesar's second waiver theory, that a psychotherapeutic patient, advised by counsel with a palpable financial interest in the case, cannot make a knowing waiver is irrelevant. We are not dealing with Seebach's actual waiver—which was revoked—but with the implied-in-law waiver made by claiming pain and suffering.

disclosure of the communication establishes in the trial court a compelling need for its production.

The restriction is limited to treating doctors. Health of the patient is a primary consideration only in the treatment situation. Moreover, the protection of privacy is critical in the context of treatment. A personal injury plaintiff who consults a psychotherapist for examination and diagnosis can reasonably be expected to know that his communications with the psychotherapist will not be privileged. The primary, if not the sole purpose, of the psychotherapist and the patient in the non-treatment setting is to secure the opinion of the doctor for the purpose of transmitting that information to third persons—the patient's lawyer, the court, and, potentially, the jury.

The fact of treatment and the time, length, and cost of treatment, at best, are only arguably "confidential communications" within Evidence Code Section 1012. (*See In re Lifschutz, supra,* 2 Cal.3d at 439, 85 Cal. Rptr. at 845.) The treating doctor's diagnosis is a confidential communication. I would compel disclosure of the diagnosis because the disclosure is necessary to permit a defendant to decide whether that mental or emotional condition has some bearing upon the issues in the personal injury case and, at least in a preliminary way, to lay some foundation for his later motion to compel revelation of other confidential communications. Moreover, this information will also help the defendant to decide whether to have the plaintiff examined and diagnosed by a psychotherapist of his own choosing.[6]

My narrowing of the waiver required by Section 1016

6. The majority opinion assumes that diagnostic examinations of this kind will not provide adequate insight into the plaintiff's medical history effectively to protect the defendant's right to access to this information. The deposition of Dr. Hume shows that the assumption is unfounded in this case.

gives neither the patient-plaintiff full protection of his privacy nor the defendant evidentiary carte blanche. But the patient's constitutional right of privacy requires no less protection from intrusion, and a defendant's right to a fair trial would be unduly impaired with any lesser access to evidence.

Still available both to the patient-plaintiff and to the defendant is the trial court's sensitive application of the waiver test to the facts in a particular case, and the trial court's use of protective orders to prevent "annoyance, embarrassment or oppression." (Cal. Code Civ. Proc. § 2019 (b)(1); *In re Lifschutz, supra,* 2 Cal.3d at 436-38, 85 Cal. Rptr. 844-45; *cf. Department of the Air Force v. Rose* (1976) ..... U.S. ..... [44 U.S.L.W. 4503].)

In conclusion, the breadth of the waiver imposed by Evidence Code Section 1016 as construed and applied to require Dr. Caesar to reveal confidential communications with his patient protected by the patient's right of privacy exceeds constitutional bounds. I would reverse the order denying Dr. Caesar's habeas petition, with directions to grant the writ within thirty days unless the contempt order were earlier vacated by the California court.

SHIRLEY HUFSTEDLER

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1976

No. 76-804

GEORGE R. CAESAR, M.D.,
Petitioner,

vs.

LOUIS P. MOUNTANOS,
(as Sheriff)
of the County of Marin,
State of California, et al.,
Respondents.

RESPONSE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit

DOUGLAS J. MALONEY,
County Counsel of Marin County,
Civic Center,
San Rafael, California 94903,
Counsel for Respondents.

STONE, O'BRIEN & HAMMOND,
JAMES D. HAMMOND,
CATHERINE NOONAN,
Of Counsel.

PERNAU-WALSH PRINTING CO. - 562 MISSION STREET - SAN FRANCISCO, CA 94105

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Respondent Louis P. Moutanous, as Sheriff of the County of Marin, State of California, respectfully submits the following opposition to the petition for writ of certiorari filed by the Petitioner herein.

OPINION BELOW

The opinion sought to be reviewed is that of the United States Court of Appeals for the Ninth Circuit, not yet officially reported, which appears in the Appendix to Petitioner's Brief. Portions of the opinion were unofficially reported as 45 U. S. Law Week 2191. No opinion was rendered by the District Court for the Northern District of California.

JURISDICTION

The jurisdictional requisites are adequately set forth in the petition.

STATUTORY PROVISION INVOLVED

Pertinent provisions of California Evidence Code Section 1016 are set forth in the Petition at page 2.

QUESTIONS PRESENTED

1. When the plaintiff in a personal injury suit claims damages due to emotional distress, does the plaintiff's treating psychiatrist have a constitutional right to assert a privilege to withhold relevant testimony concerning the plaintiff-patient's emotional injuries, regardless of patient's wishes, on the basis that California Evidence Code §1016 unconstitutionally interferes with the patient's rights to privacy, due process and equal protection of the law?

2. Does California Evidence Code §1016 deprive a patient litigant of her rights to privacy, due process and equal protection of the law by requiring disclosure of otherwise privileged information which is relevant to a specific emotional condition that the patient-plaintiff has tendered as an issue in a suit for personal injuries?

STATEMENT OF THE CASE

This case involving the interpretation of California Evidence Code §1016 arises out of a personal injury action brought against Respondents by Petitioner's patient, Joan Seebach. Section 1016 of the California Evidence Code, the so-called "patient-litigant" exception to the psychotherapist-patient privilege, requires disclosure of communications made to a psychiatrist concerning mental or emotional conditions which the patient has put into issue in a suit for damages. In a highly emotional narrative, Petitioner would lead the Court to believe that the challenged section violates a patient's privacy by requiring her to divulge all her personal information including the most intimate fantasies which she may have confided to her psychotherapist whenever she brings a suit for personal injuries and damages. On the contrary, Evidence Code §1016 both on its face, and as interpreted by the California Supreme Court, in the case of *In re Lifschutz* (1970) 2 C.3d 415, 467 P.2d 577, 44 A.L.R. 3d 1, strictly limits a psychotherapist's testimony to information which is relevant to a specific emotional condition which the patient herself puts in issue.

Furthermore the Petitioner would have the Court believe that the Respondents in this case are attempting to violate plaintiff-patient's privacy by demanding a full account of her entire psychiatric history and the complete text of her confidences in the course of therapy, regardless of relevance to her personal injury claims. Respondents in this case have *not* asked Petitioner to disclose all the plaintiff's confidential communications to him. Rather, the entire controversy involves Petitioner's refusal to answer eleven specific questions which do not impinge on the content of confidential communications. Instead, defendant seeks the Petitioner's professional opinion, based upon his treatment of the plaintiff, as to whether she was suffering from an abnormal emotional condition; whether this condition was related to the accidents in question or to some earlier event in her life, and whether the condition had improved as a result of the Petitioner's care. The answers to these questions are indispensible to the defendant's determination of the extent of his liability for Miss Seebach's claimed emotional difficulties.

The plaintiff in this case, Joan Seebach, was involved in a series of automobile accidents which are the subject of her suit against Respondents for personal injuries. A neurologist who was treating Miss Seebach for her injuries felt that she might be suffering some emotional sequalae following her involvement in one of the accidents. Therefore he referred her to the Petitioner, Dr. Caesar, who saw Miss Seebach approximately twenty times for psy-

chiatric therapy. Although she did not specifically plead an emotional condition in her Complaint, Miss Seebach and her attorney indicated in deposition and in answers to interrogatories that the expenses for psychotherapy with Dr. Caesar were an element of the damages claimed. Defendants therefore noticed the deposition of Dr. Caesar to determine the cause and degree of Miss Seebach's emotional injuries and the nature, extent and progress of her treatment.

Dr. Caesar appeared for his first deposition but refused to answer any questions. He claimed that under Evidence Code §1014 any information he might have was privileged in the absence of Miss Seebach's consent to his testimony. When he was informed by Miss Seebach's attorney that she had waived her privilege, Petitioner indicated that in his opinion her consent was irrelevant. Petitioner believed *he* had a right to an absolute privilege concerning psychotherapeutic communications and he persisted in his refusal to testify.

After a hearing on the matter, the Marin County Superior Court rejected Dr. Caesar's contention that the California Supreme Court holding in ***In re Lifschutz,*** supra, precluded the defendant from taking his deposition. That case holds that a psychotherapist does not have a constitutional right to assert a patient's privilege with respect to a communication if the privilege has been waived or if the communication falls within the patient-litigant exception of Evidence Code §1016. The Superior Court found that Miss Seebach had waived the psychotherapist-patient

privilege by placing her emotional condition in issue and that §1016 required Dr. Caesar to attend the deposition and to answer all questions with regard to her emotional condition.

At the second deposition Dr. Caesar continued to refuse to answer any questions concerning his consultations with Miss Seebach. The Superior Court ordered the Petitioner to answer eleven relevant questions and he petitioned the California Court of Appeal for a writ of certiorari directing the Marin County Superior Court to annul its order. In its opinion the Appellate Court held that a psychotherapist does not have a constitutional right to absolute confidentiality regardless of the wishes of his patient and that psychiatrically cognizable conditions were put in issue in the personal injury action. The Court held that the Superior Court order required Petitioner to answer the eleven questions, which were "... directly related to plaintiff's psychiatric condition which plaintiff and her counsel claim resulted from the accidents." (Appendix C, at xvi) In examining the questions the Appellate Court concluded that, "[t]here is nothing appearing from the eleven questions which would indicate an answer referring to any condition of plaintiff's other than a condition for which she is seeking pecuniary recovery." (Appendix C, at xvii). The Court therefore denied the petition but, sensitive to the interest of the plaintiff, remanded the cause to the Trial Court for consideration of possible protective measures which would safeguard the plaintiff's personal privacy without diminishing the rights of the defendants in discovery or at time of trial.

Neither the Petitioner nor the plaintiff moved for a suitable protective order. After the Appellate Court's ruling, the plaintiff expressly waived any objections to Dr. Caesar's testimony. (Appendix B) Petitioner sought review in the California Supreme Court which denied certiorari without opinion. The subsequent petition for habeas corpus in the United States District Court was similarly denied without written comment.

In his appeal to the U. S. Court of Appeals for the Ninth Circuit, Petitioner argued that §1016 violated *his* privacy and that the constitution requires a psychotherapist to have an absolute privilege not to disclose communications made in the course of psychiatric treatment because such disclosure may be harmful to the patient's emotional health and thus force the doctor to violate his Hippocratic oath. The Court found that the *Lifschutz* decision fully and correctly disposed of Petitioner's contentions and it rejected Petitioner's argument that the decisions of this Court in *Roe v. Wade* (1973) 410 U.S. 113 and *Doe v. Bolton* (1973) 410 U.S. 179, invalidated the holding of *Lifschutz* by expanding the constitutional dimensions of the doctor-patient relationship to require absolute privilege for all communications in the course of psychotherapy. Referring to the language of *Roe v. Wade,* 410 U.S. 113, at 153-154, the Court held that although the doctor-patient relationship is within the patient's constitutionally protected zone of privacy, this right to privacy is nevertheless conditional, not absolute and may be subject to state regulation. (Petitioner's Appendix, at 7) As with all

fundamental constitutional rights, the right to privacy must be balanced with competing individual rights and compelling State interests.

The U. S. Court of Appeals found that §1016 on its face and as interpreted by the holding in *In re Lifschutz* does not unconstitutionally deny plaintiff any privacy rights. Rather, the information required under §1016, particularly the information sought in this case, is no more than is absolutely necessary to serve the State's compelling interests in insuring the integrity of its judicial process and safeguarding the defendant from being deprived of his property without due process of law.

Because Dr. Caesar's refusal to testify was obstructing the process of the litigation to the prejudice of all the parties, Miss Seebach's attorney had her consult with a forensic psychiatrist, Dr. Hume, for a diagnosis prior to trial. Partly because of her experiences with Dr. Caesar, Miss Seebach was reluctant to meet with Dr. Hume and consulted her for only two hours. In Dr. Hume's opinion, Miss Seebach was suffering from a mild depression as a result of her injuries. However, Dr. Hume's testimony was limited and was not an adequate substitute for the testimony of the treating psychiatrist, "since she was unable to testify with respect to Miss Seebach's condition when she was examined by Dr. Caesar or any change in condition during the rather extended period of psychotherapy." (Petitioner's Appendix, at 13).

Therefore plaintiff's ability to establish her claim for emotional damages and the Respondent's opportunity to assess the extent of his liability and defend his case has been substantially prejudiced by Dr. Caesar's unwarranted refusal to testify.

REASONS FOR DENYING THE WRIT

1. UNDER THE FACTS OF THIS CASE PETITIONER DOES NOT HAVE STANDING TO RAISE THE QUESTION OF WHETHER CALIFORNIA EVIDENCE CODE SECTION 1016 UNCONSTITUTIONALLY INTERFERES WITH HIS PATIENT'S RIGHT TO PRIVACY, DUE PROCESS, AND EQUAL PROTECTION OF LAW.

a. Petitioner is not harmed by the application of Evidence Code §1016.

Petitioner does not have standing to raise the questions raised in the Petition because the application of California Evidence Code §1016 does not harm Petitioner or affect any of his constitutional rights. See *Sierra Club v. Morton* (1972) 405 U.S. 727. Petitioner states that he faces incarceration for his stand in "maintaining the essential ethical mandate of his profession, that he not break the silence which is necessary for him to function as a healer." (Petition, at 13) However, Petitioner's entire argument is based upon the assertion of the rights of a third party. The full content of the Petitioner's argument is not that he himself is faced with an unconstitutional deprivation of rights but that the Code section compelling his testimony in his patient's suit for damages violates the rights of his patient. Petitioner's position in this case is that of a witness in civil contempt of Court for refusing to testify on the grounds that the statute compelling his testimony unconstitutionally

infringes on the privacy right of a party in the case. This Court has already resolved such a situation in the case of *Blair v. United States* (1919) 250 U.S. 273, when it held that a witness in an action could not refuse to testify on the grounds that the statute involved was unconstitutional. Petitioner incorrectly cites the holding of *Hensley v. Municipal Court* (1973) 411 U.S. 345, as giving him standing to challenge the constitutionality of §1016 by asserting the privacy rights of his patient. That case held that a person released on his own recognizance is in custody within the meaning of the federal habeas corpus statute. Neither *Hensley,* nor any other case decided by this Court is authority for the proposition that a person in Petitioner's position has standing to assert the rights of third persons.

This Court has held repeatedly that it will not review a case unless the questions presented have been properly brought before the Court by the person whose interests entitle him to raise them. *Blair v. United States* (1918) 250 U.S. 273, 279; *Moose Lodge v. Irvis* (1972) 407 U.S. 163; *Sierra Club v. Morton* (1972) 405 U.S. 727. This Court said in *Barrows v. Jackson:*

> "Ordinarily, one may not claim standing in this Court to vindicate the constitutional rights of some third party . . . The requirement of standing is often used to describe the constitutional limitation on the jurisdiction of this Court to cases and controversies. Apart from the jurisdictional requirement, this Court has developed a complimentary rule of self-restraint for its own

> governments . . . which ordinarily precludes a person from challenging the constitutionality of state action by invoking the rights of others [Cites omitted] The common thread underlying both requirements is that a person cannot challenge the constitutionality of a statute unless he shows that he himself is injured by its operation."
>
> *Barrows v. Jackson* (1952) 346 U.S. 249 at 255.

Petitioner is unable to show that he is prejudiced by the operation of §1016. No communications or information personal to the Petitioner are sought to be disclosed. Nor does §1016 regulate or seek to affect the way Petitioner practices his profession. In the case of *In re Lifschutz,* 2 C.3d 415, 467 P.2d 557, the California Supreme Court correctly determined that, ". . . compelled disclosure of relevant information obtained in a confidential communication does not violate any constitutional privacy rights of the psychotherapist." 2 C.3d 415 at 423. "It is the depth and intimacy of the *patient's* revelation that give rise to the concern over compelled disclosure; the psychotherapist, though undoubtedly deeply involved in the communicative treatment, does not exert significant privacy interest separate from his patient." 2 C.3d at 424.

The validity of this conclusion is not affected by the recent decisions of this Court in *Singleton v. Wulff* (1976) ..... U.S. .....; *Planned Parenthood of Central Missouri v. Danforth* (1976) ..... U.S. .....; *Bellotti v. Baird* (1976) ..... U.S. .....; *Roe v. Wade* (1973) 410 U.S. 113; *Doe v. Bolton* (1973) 410 U.S.

179, or *Griswold v. Connecticut* (1965) 381 U.S. 479, which are cited by Petitioner. The holdings of those cases that the treatment relationship between a doctor and his patient is within the *patient's* zone of privacy does not, under the facts of this case, give standing to the Petitioner to assert his patient's privacy interest. Petitioners in the cited cases had standing to assert the privacy interests of third parties because, as this Court reasoned, "the rights of the third parties pressed [there], are likely to be diluted or adversely affected unless those rights are considered in a suit involving those who have this kind of confidential relation to them." *Griswold v. Connecticut* (1965) 381 U.S. 479. This narrow exception to the normal requirements of standing is not applicable here because Petitioner's patient is herself a party to the action and therefore is fully capable of challenging the constitutionality of Evidence Code §1016 for any threat that it might pose to her rights of privacy and due process. Not only has the patient in this case chosen not to challenge Evidence Code §1016 as it applies to her, but she has voluntarily and affirmatively taken a stance diametrically opposed to the position of Petitioner. (Appendix B)

b. Petitioner's interests in this case are adverse to those of the person whose constitutional rights he allegedly seeks to protect.

Petitioner's basic complaint is that the State through Evidence Code §1016 infringes upon the patient's right to privacy because it does not grant to the Petitioner the power to prevent his patient

from disclosing information about herself. Petitioner claims that he is constitutionally entitled to this power because the psychotherapeutic relationship may suffer if the patient is able to compel her therapist to disclose her confidences to him. Furthermore, Petitioner claims that requiring him to testify causes him to breach her confidences to him and thus go against the tenets of his profession.

Petitioner's position is untenable under the facts. In this case, the Petitioner's patient expressly waived any privileges attaching to her confidential relationship with him and it was her own desire that he answer the questions posed. (Appendix B) Thus by the patient's own action there was no longer any confidential relationship to protect and Petitioner's disclosures would not have constituted a breach of faith. Dr. Caesar's continued refusal to testify is in direct opposition to the patient's expressed interests and desires.

c. Under the facts of this case, the act of granting Petitioner standing to assert the privacy interests of the patient would, in itself, be a threat to the patient's constitutional rights.

Petitioner contends that the nature of psychotherapy is such, that regardless of the patient's wishes, the psychotherapist must exercise ultimate control over all information concerning the treatment relationship. He maintains that this unilateral control is necessitated by the fact that disclosure will jeopardize the treatment relationship and can be harmful to the patient in a way that he is incapable of understanding. (Petition, at 4-5) Petitioner's argu-

ment does more to threaten than it does to protect the individual patient's constitutional right to privacy. The danger of Petitioner's position lies in the fact that, under the guise of protecting his patient's right to privacy and human dignity, Petitioner is actually denying those rights. Privacy is not merely an interest in the nondisclosure of personal information. A person's right to privacy consists of *control* over the dissemination of information *about himself* and access to the information necessary to make personal decisions. It is this element of personal autonomy which is the keystone of the right to privacy and which is essential to the maintenance of a free society. See A. Westin, *Privacy and Freedom* 8-63, 330-38 (1st Edition 1967); Fried, "Privacy", 77 *Yale Law Journal* 475 (1968); *Griswold v. Connecticut* (1965) 381 U.S. 479; R. G. Dixon, "The Griswold Penumbra: Constitutional Charter for an Expanded Law of Privacy", 64 *Michigan L. Rev.* 197.[1]

Petitioner contends that the State has no power to infringe upon the patient's control over his personal privacy. It is therefore anomalous for him to suggest that this power should rest in a third person, namely himself, against whom a patient would have

[1]Cases in which the therapist opposes the patient's desire to disclose psychiatric information are not infrequent. See, *Commonwealth ex rel. Romanowicz v. Romanowicz* (1968) 213 Pa. Super. 382, 248 A.2d 238, 240; *Hampton v. Hampton* (1965) 241 Ore. 277, 405 P.2d 549. It is precisely because the psychotherapist may attempt to deny the patient's autonomy that statutes creating the psychotherapist-patient privilege make the patient the holder of the privilege. See, Suarez and Hunt, "The Patient-Litigant Exception in Psychotherapist-Patient Privilege Cases: New Considerations for Alaska and California Since *In Re Lifschutz.*" U. C. L. A.-Alaska L. Rev. 2, 14 (1971).

even less recourse should there arise a situation, such as the one here, where the patient's interests and desires are opposed to those of the doctor. In *Planned Parenthood of Central Missouri v. Danforth* (1976), ... U.S. ..... this Court held that decisions affecting personal privacy and autonomy are solely the preogative of the person primarily affected. That case involved a state statute forbidding married women to have abortions without the consent of the husband. The husband's interest in that situation was far more substantial and personal than the Petitioner's interest in this case. Neverthless, the Court found that the right of privacy is necessarily accompanied by personal autonomy and that the State cannot delegate authority which it does not have. 49 L.Ed. 788 at 805.

Petitioner's contention that the psychotherapist must be able to withhold information regardless of the wishes of his patient, because she lacks the understanding to make to make her own decision, reflects a paternalistic attitude which is totally incompatible with the basic tenets of a free society. See Fried, "Privacy" 77 *Yale Law Journal* 475 (1968). This Court should be wary of denying any legally competent person the right to make a personal decision on the ground that this denial of freedom is for her own good. Surely the psychiatrist is in a position to counsel the patient as to her best interests; however, the final decision must be hers. Anything less is a denial of her dignity and personal freedom. Constitutional rights do not lose their force simply

because the exercise of those rights may be unwise in a given situation.

---

2 THE DECISION OF THE COURT BELOW WAS CORRECT

Assuming, for the sake of argument, that the Petitioner does have standing to raise the questions presented, these arguments were carefully analyzed and correctly decided by the Court below which based its opinion on the California Supreme Court decision in *In re Lifschutz* (1970) 2 C.3d 415, 467 P.2d 557, 44 A.L.R.3d 1. In that case the California Supreme Court found that there is no constitutional requirement of an absolute privilege against disclosure of communications by a patient to her psychotherapist. The Court held that California Evidence Code §1016 is not an unconstitutional infringement of the patient's privacy, since the power to limit or prevent disclosure rests solely with the plaintiff. The state in no way forces disclosure of matters that she does not wish to adjudicate. That Court also held that neither Evidence Code §§1014, 1016 nor the U.S. Constitution was interpreted in *Griswold v. Connecticut* (1965) 381 U.S. 479, created an independent right of privacy of the doctor in a doctor-patient relationship. The patient is quite properly the holder of the privilege—no personal privacy rights of the therapist are jeopardized by its waiver. In this case, the patient-plaintiff has expressly waived any objection to the testimony of her therapist. She informed him that she was no longer his patient and that it was

her wish that he testify concerning the matters in issue. (Appendix B; Petitioner's Appendix at 3-4)

Both the California Court of Appeal and the U.S. Court of Appeals correctly held that the recent decisions of this Court in *Roe v. Wade* (1973) 410 U.S. 113 and *Doe v. Bolton* (1973) 410 U.S. 170 cited by Petitioner did not affect the validity of the *Lifschutz* ruling that neither the patient nor the psychotherapist has an absolute right of privacy with regard to the treatment relationship. In the words of the California Court of Appeal: "The situations in those cases are a long way from the situation in the case at bench. There the violation of the right of privacy was forced on the individual. In the instant case it is the action of the individual himself who, in order for financial gain, is required to waive the particular right of privacy." (Opinion of the California Court of Appeal, Appendix C, at xii). Also, the right of privacy existing in the doctor-patient relationship in the cited cases was held to be conditional and could be regulated where appropriate to protect compelling State interests. (Petitioner's Appendix, at 8).

a. California Evidence Code §1016 is not an overly broad intrusion into the patient's right of privacy.

Petitioner mistates the law when he argues that the patient-litigant exception to the psychotherapist-patient privilege is unconstitutionally overly broad because it requires the patient to either disclose her entire pyschiatric history or abandon her claim for emotional damages. Petitioner asserts that the Cali-

fornia Supreme Court decision in *In re Lifschutz* attempted to cure this overbreadth by limiting the scope of disclosure. Petitioner's argument ignores the plain language of the statute in question and the purpose and effect of the *Lifschutz* ruling. California Evidence Code §1016 states:

> "There is no privilege under this article as to a communication *relevant to an issue* concerning the mental and emotional condition of the plaintiff if such issue has been tendered by:
>
> a) The patient . . ." (emphasis added)

The Court in interpreting this Code section looked to the plain language of the statute and concluded that it was not an unwarranted invasion of the patient's privacy because the statute limits inquiry to "those matters which the patient himself has chosen to reveal by tendering them in litigation." *In re Lifschutz* (1970) 2 C.3d 415, 427, 467 P.2d 557. The California Supreme Court was sensitive to the need for confidentiality in the psychotherapeutic relationship and demonstrated a clear understanding of the constitutional basis of the patient's expectations of privacy. However, the Court concluded:

> "Even though a patient's interest in the confidentiality of the psychotherapist-patient relationship rests, in part, on constitutional underpinnings, all state 'interference' with such confidentiality is not prohibited. *In Section 1016 we do not deal with a provision which seeks to proscribe the association of psychotherapist and patient entirely, but instead we encounter a provision carefully tailored to serve the historically*

> *important state interests of facilitating the ascertainment of truth in connection with legal proceedings."* (Cites omitted) 2 C.3d 415 at 432. (emphasis added)

In the case of *Roberts v. Superior Court* (1973) 9 C.3d 330, 508 P.2d 309, the California Supreme Court reaffirmed its ruling in *Lifschutz* by strongly rejecting the argument that §1016 was an automatic and complete waiver of the psychotherapist-patient privilege whenever the patient brings a routine civil suit for personal injury. The Court again stressed that §1016 requires a waiver only when assertion of the privilege would allow the patient to sue for specific emotional injuries without supplying evidence of the claim.

In addition to the statutory limitation, the Court in *Lifschutz* noted that valid privacy interests of the patient were further safeguarded by the availability of protective measures provided in Code of Civil Procedure §2019(b)(1) and by Evidence Code §352 which allows the judge in his discretion to exclude evidence when its prejudicial effect outweighs its probative value. Petitioner argues that the usefulness of a protective order is an illusion. In this case, however, the futility of a protective order is a theoretical conclusion for which Petitioner offers no factual support. The plaintiff here never objected to the questions asked of Petitioner and no protective orders were needed or sought.

Petitioner also argued that the statute must fall for overbreadth because less burdensome alternatives

are available to the State. Petitioner does not reveal what those less burdensome methods might be, although he suggests that examination by a forensic psychiatrist for the purposes of diagnosis prior to trial is an acceptible alternative. As the U. S. Court of Appeals aptly pointed out, testimony resulting from such an examination cannot, in any way, substitute for the observations of the psychotherapist made in the candid atmosphere of the treatment relationship. (Petitioner's Appendix, at 13)

Petitioner's other suggestion that the psychotherapist be granted an absolute privilege is equally untenable. As has already been demonstrated, such a privilege would be subject to constitutional challenge by either the plaintiff-patient or the defendant in a case of this kind.

b. The patient-litigant exception set out in California Evidence Code §1016 is necessary to insure the integrity of the judicial process and safeguard the rights of the defendant to due process of the law.

Citing Mr. Justice White's concurring opinion in *Murphy v. Waterfront Commission* (1964) 378 U.S. 52, 93-94, the Court below correctly determined that the State has a compelling interest in the ascertainment of truth in legal proceedings. (Appendix to Petitioner's brief, page 11) The right to compel testimony in order to determine truth is basic to our system of justice. See *Blackmer v. United States* (1932) 284 U.S. 421; *Blair v. United States* (1919) 250 U.S. 273, 279; *Wilson v. United States* (1911) 221 U.S. 361; *Louisell and Sinclair,* "Reflections on

the Law of Privileged Communications—The Psychotherapist-Patient Privilege in Perspective" 49 Cal. L. Rev. 30, 42 (1971).

In addition to its interest in insuring the ascertainment of truth in its judicial process, the State has an interest in promoting activities and relationships which are of a particular benefit to the social structure. See R. M. Fisher, "The Psychotherapeutic Professions and the Law of Privileged Communications", 10 *Wayne L. Rev.* 609, 610-612 (1954): Note, "Limitations on California Professional Privileges: Waiver Principles and Policies They Promote", 9 *University of California, Davis,* (1976) 477, 479-480; *Louisell and Sinclair, supra;* 8 Wigmore, *Evidence* §2200 (McNaughton rev. ed. 1961). In furtherance of this interest the State has created privileges against disclosure of evidence gained through certain relationships where the legislature has determined that the probative value of such disclosure is outweighed by the value to society of protecting the confidentiality of the relationship.

However, it is misleading to say and incorrect to assume, as Petitioner has done, that the State has demonstrated its lack of a compelling interest to insure that truth is ascertained in legal proceedings because California's legislative scheme "allows broad exceptions to the proposition that all must fully testify." (Petition at 8.) On the contrary, a more thorough analysis of California's legislative scheme reveals the State's genuine concern that its judicial proceedings be conducted in accordance with the principles of due

process of law. All of the privileges cited by Petitioner are subject to statutory exception when the circumstances are such that upholding the privilege would obstruct justice or exclude evidence essential to a fair hearing and deny a party to the proceeding a full opportunity to present evidence and defend claims. (See Petitioner's Appendix at 9-10.)

c. California Evidence Code §1016 does not violate the Equal Protection Clause of the Fourteenth Amendment.

Section 1016 does not violate the Equal Protection Clause by requiring the plaintiff to present evidence supporting her claims of emotional damage in a suit for personal injuries. Instead, Section 1016 operates to insure that all parties to civil actions in California Courts are guaranteed equal protection of the laws. As the Court below stated, "Every person who brings a lawsuit under our system of jurisprudence must bear disclosure of those facts upon which his claim is based. Section 1016, *rather than discriminating improperly against psychotherapy patients, instead places them on the same footing as other litigants.*" (Petitioners' Appendix at 9, emphasis added)

Petitioner's argument that the State conditions access to its Courts upon a waiver of the patient-plaintiff's constitutional right is not correct. Plaintiff is not denied access to the Courts but is merely being asked to produce evidence directly relevant to the nature and cause of her alleged damages so that the defendant may be given a fair opportunity to defend. The presentation of evidence supporting claims for

damages is simply what the principles of due process demand of every party seeking restitution through the Courts.

The privilege in psychotherapeutic relationships is designed to protect the patient from the humiliation and embarrassment which might result from disclosure of the condition for which the patient is receiving treatment. However, when the patient herself discloses her mental difficulties by placing their existence, cause, and extent in issue in a suit for damages, there is no longer any reason for the privilege. See *City and County of San Francisco v. Superior Court* (1951) 37 C.2d 227, 232, 231 P.2d 26, 29. Furthermore, as the Court below observed, Evidence Code Section 1016 "neither contemplates a complete waiver of the psychotherapeutic communication privilege nor seeks to deter psychotherapy patients from instituting lawsuits . . . disclosure is strictly limited to that information placed in issue by the plaintiff himself and about which he and his psychotherapists have practically exclusive knowledge." (Petitioner's Appendix at 9) To grant a privilege to exclude evidence of this nature would be unfair. Plaintiff cannot assert a claim for damages and then foreclose relevant investigation into the truth of her claim. *Koump v. Smith* (1969) 25 N.Y.2d 287, 294, 250 N.E.2d 857, 861, 303 N.Y.S.2d 858, 864; *Schlagenhauf v. Holder* (1964) 379 U.S. 104, 126.

The case of *Boddie v. Connecticut* (1971) 401 U.S. 371, 379, cited by Petitioner to support his argument

that the plaintiff-patient is unconstitutionally denied access to the Courts is inapplicable because that case involved a special set of facts which bear no relationship to the circumstances of this case. In *Boddie* the parties were denied access to the Courts to obtain a judicial dissolution of their marriage because they were too poor to pay the filing fees. This Court held that it was a denial of due process and equal protection to condition the dissolution of marriage, which involves interests of basic importance to society, on the economic status of the parties. The Court spoke in terms of the State's denial of access to the Courts because there was no alternative forum available for the resolution of this fundamental interest. The Court limited its decision in *Boddie* to the facts of that case and went on to say:

> "We do not decide that access for all individuals to the courts is a right that is, in all circumstances, guaranteed by the Due Process Clause of the Fourteenth Amendment so that its exercise may not be placed beyond the reach of any individual, for, as we have already noted, in the case before us this right is the exclusive precondition to the adjustment of a fundamental human relationship." 401 U.S. 371 at 382.

This Court has said:

> "Due process does not, of course, require that the defendant in every civil case actually have a hearing on the merits. A State, can, for example, enter a default judgment against a defendant who, after adequate notice, fails to make a timely appearance, [cites omitted] or who, without justifiable excuse, *violates a procedural rule*

> *requiring the production of evidence necessary for orderly adjudication.*"
>
> *Hammond Packing Co. v. Arkansas* (1909) 212 U.S. 322, 351, 29 S.Ct. 370, 380, 53 L.Ed. 530 (emphasis added).

What the Constitution does require is:

> "An *opportunity* . . . granted at a meaningful time and in a meaningful manner [Citations omitted] for [a] hearing appropirate to the nature of the case, *Mullane v. Central Hanover Bank & Trust Co.,* 339 U.S. at 313, 70 S.Ct. at 657."

In the case at bar, plaintiff has not been denied access to the Court. Unlike cases of *Ortwein v. Schwab* (1973) 410 U.S. 656 and *United States v. Kras* (1973) 409 U.S. 434, cited by Petitioner, no preconditions have been placed upon filing a claim for personal injuries. She is not required to file a bond, *Cohn v. Beneficial Loan Corporation* (1949) 337 U.S. 541; she is not discriminated against on the basis of wealth, *Griffin v. Illinois* (1956) 351 U.S. 12, nor she is not denied any constitutional rights without a hearing of the evidence in her favor. *Sniadach v. Family Finance Corporation* (1969) 395 U.S. 337; *Goldberg v. Kelly* (1970) 397 U.S. 254.

The law demands fairness, justice and equality. Every litigant, plaintiff and defendant alike, is entitled to access to evidence required to prove or disprove the matters at issue. This is precisely what section 1016 CCP, State of California attempts to achieve and does achieve.

CONCLUSION

For all of the above reasons, Respondent respectfully submits that the petition for writ of certiorari should be denied.

Respectfully submitted,
DOUGLAS J. MALONEY,
County Counsel of Marin County,
Counsel for Respondents.

STONE, O'BRIEN & HAMMOND,
JAMES D. HAMMOND,
CATHERINE NOONAN,
Of Counsel.

March 9, 1977.

(Appendices Follow)

APPENDICES

Appendix A

QUESTIONS WHICH DR. CAESAR REFUSED TO ANSWER

1. "Did he [Dr. Klemme] say why, in his opinion it [a talk with Dr. Caeser] might be helpful to her?

2. [A]t the last time or at the occasion of your last consultation with her, would you describe her mental condition as being one of mild depression pertaining to the—or as a result of the physical injuries which she says that she was suffering from as a result of the three accidents which I previously referred to?

3. Would you please state what that opinion is, Doctor? [With respect to whether Miss Seebach suffered from any emotional distress of any kind as a result of her having been in those two accidents.]

4. [D]id you notice an improvement with respect to the degree of her depression over the period of time that she was under your treatment?

5. [A]re you able, Doctor, to relate the condition which you've described concerning the state of Miss Seebach's depression or the degree of Miss Seebach's depression at the time of your initial two interviews to any particular trauma or incident that may have occurred in her life?

6. Do you have an opinion as to whether or not the depression which you've described that existed at the time of your initial two interviews related to trauma that Miss Seebach suffered as a result of the two accidents in which she was involved, that you now recall?

7. Will you state what that opinion is?

8. [D]id you form an opinion immediately subsequent to your initial two interviews with Miss Seebach at the hospital concerning any emotional distress which she might have been suffering from which directly related to the two accidents which we've previously referred to in which she was involved?

9. Doctor, did you, during the course of your treatment of Miss Seebach—and by 'course,' I mean all of your interviews and consultations with her—form any opinion that her condition, mental or emotional condition, did not, in any way, relate to the accident in which she was involved and which you have knowledge of?

10. . . . whether the state of depression was a result of the combination of the accidents in which she was involved which you now recall and other factors in her life?

11. After the letter, [to another doctor which said he could not say whether psychological factors played a role in the back pain] did you form an opinion as to whether or not psychological factors played a role in the origin or aggravation of the cervical pain which Miss Seebach said that she was suffering from?"

Appendix B

(Letterhead of
Law Offices of
Raymond E. Bright
463 Pacific Avenue
San Francisco
94133)

December 13, 1976

Clerk of the Court
United States Court of Appeals for the Ninth Circuit
7th and Mission Streets
P. O. Box 547
San Francisco, California 94101

Re: George R. Caesar, M.D., Petitioner vs. Louis P. Mountanos, as Sheriff of the County of Marin, State of California, et al., Respondents.
Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Dear Sir:

I have just received petitioners Petition for Writ of Certiorari in the above entitled case. Although my client, Joan Seebach, is not a party to said petition, she is the plaintiff in the underlying case pending in the Superior Court, Marin County, State of California.

Although Miss Seebach has not taken part in any of the appeals by Dr. Caesar, I would desire to clarify

any possible misunderstanding of my client's position regarding the privilege claim by Dr. Caesar.

In September of 1972 plaintiff did, as a favor to Dr. Caesar, file an attempted revocation of any waiver of the privilege. After the Superior Court's ruling, plaintiff has not claimed any privilege. This has been stated to all the parties numerous times, including in open Court, in the Superior Court of the State of California, In And For The County of Marin, and in Letters to all counsel including letters of July 31, 1975 and January 5, 1976.

In the jurat letter of July 31, 1975, to the defense attorneys in Miss Seebach's personal injuries action and to Dr. Caesar's attorney, Kurt W. Melchior, I stated "in regard to Dr. Caesar, my client has waived the doctor-patient privilege and is agreeable to Dr. Caesar's testifying in this case". In the letter of January 5, 1976 to the same attorneys, I stated "as you know, my client has not and does not presently have any objection to Dr. Caesar testifying".

Since Miss Seebach's position as patient did not seem to be fully expressed in the petition, I thought I should bring this point to the Court's attention.

Sincerely,
REB
RAYMOND E. BRIGHT

REB:djh
Dictated/Not Read
cc: James D. Hammond, Jr., Esq.
David J. Costamagna, Esq.
Kurt W. Melchior, Esq.

(NOT TO BE PUBLISHED IN OFFICIAL REPORTS)

Appendix C

In the Court of Appeal of the State of California
First Appellate District, Division Four

1 Civil No. 32,556

Superior Court
Nos. 54650, 56123

George R. Caesar,
Petitioner,

vs.

Superior Court of the State of California in and for the County of Marin,
Respondent.

Hans Van Boldrick, Robert Wilcox, John Wilcox, County of Marin and Madsen Construction Company,
Real Parties in Interest.

[Filed May 15, 1973]

OPINION

Petition for writ of certiorari directing the Marin County Superior Court to annul its order directing petitioner to answer certain questions.[1]

[1]An amicus curiae brief in support of the petitioner has been filed herein by Hassard, Bonnington, Rogers & Huber, Howard Hassard, David E. Willett and Laurence W. Kessenick, attorneys for the California Medical Association.

Questions Presented

1. Psychotherapist does not have a constitutional right to absolute confidentiality.
2. Psychiatrically cognizable conditions were put in issue in the personal injury actions.
3. The court order does not afford plaintiff and petitioner sufficient protection.

Record

Joan E. Seebach (hereinafter referred to as "plaintiff") was injured in two different automobile accidents. To recover damages for her injuries she filed two personal injury actions in the Marin County Superior Court, one against real parties in interest Wilcox as defendants, the other against the County of Marin, Madsen Construction Company and Hans Van Boldrick as defendants. Defendants[2] noted the deposition of petitioner who is a licensed physician specializing in the practice of psychiatry and psychotherapy, and who was consulted some 20 times by plaintiff subsequent to her accidents. At the taking of his deposition, petitioner asserted the psychotherapist-patient privilege pursuant to sections 1012 and 1015 of the Evidence Code and refused to testify concerning his knowledge of plantiff derived from the psychotherapist-patient relationship. Defendants then certified to the court petitioner's failure to answer questions. The court after a hearing made its order compelling petitioner to testify and answer the questions posed to him and certified to the court. The

[2]Unless otherwise noted herein, "defendants" will refer to the defendants in both actions. It appears that plaintiff was involved in three auto accidents, two resulting in the abovementioned suits.

order further provided that if petitioner refused to testify he would be deemed in contempt of the court. Execution of sanctions was stayed to enable petitioner to attack the validity of the order in the appellate court.

Evidence Code section 1016 applies.

Section 1014 provides in pertinent part ". . . except as otherwise provided in this article, the patient, whether or not a party, has a privilege to refuse to disclose, and to prevent another from disclosing, a confidential communication between patient and psychotherapist if the privilege is claimed by: (a) The holder of the privilege; . . . (c) The person who was the psychotherapist at the time of the confidential communication, *but such person may not claim the privelege . . . if he is otherwise instructed by a person authorized to permit disclosure.*" (Emphasis added.)

Section 1015 provides: "The psychotherapist who received or made a communication subject to the privilege under this article shall claim the privilege whenever he is present when the communication is sought to be disclosed and is authorized to claim the privilege under subdivison (c) of Section 1014."

Section 1016 provides: "There is no privilege under this article as to a communication relevant to an issue concerning the mental or emotional condition of the patient if such issue has been tendered by: (a) The patients; . . ."[3]

[3]Evidence Code section 996, referring to the physician-patient relationship is substantially the same as section 1016.

Petitioner contends: (1) That a psychotherapist has a constitutional right to absolute confidentiality in his communications with, and treatment of, patients which gives him the right to refuse to disclose such confidential communications regardless of the wishes of a patient in a particular case.

(2) That in the personal injury actions plaintiff has not put a psychiatrically cognizable condition in issue and therefore specifically refused to waive the privilege between her and petitioner.

(3) That in any event, the court order fails to afford petitioner and plaintiff the protection accorded to psychotherapeutic communications under the decisional law of California.

1. *Psychotherapists do not have a constitutional right to absolute confidentiality.*

The contention of petitioner on this subject has been answered by the Supreme Court in *In re Lifschutz* (1970) 2 Cal.3d 415, 422-423, where the petitioner made identically the same contention on this issue as does petitioner here. The court said: "Properly viewed, the broadest issue before our court is whether the Legislature, in attempting to accommodate the conceded need of confidentiality in the psychotherapeutic process with general societal needs of access to information for the ascertainment of truth in litigation, has unconstitutionally weighted its resolution in favor of disclosure by providing that a psychotherapist may be compelled to reveal relevant

confidences of treatment when the patient tenders his mental or emotional condition in issue in litigation. For the reasons discussed below, we conclude that, under a properly limited interpretation, the litigant-patient exception to the psychotherapist-patient privilege, at issue in this case, does not unconstitutionally infringe the constitutional rights of privacy of either psychotherapists or psychotherapeutic patients. As we point out, however, because of the potential of invasion of patients' consitutional interests, trial courts should properly and carefully control compelled disclosures in this area in the light of accepted principles."

The court further said (p. 438): "In sum, we conclude that no constitutional right enables the psychotherapist to assert an absolute privilege concerning all psychotherapeutic communications. We do not believe the patient-psychotherapist privilege should be frozen into the rigidity of absolutism. So extreme a conclusion neither harmonizes with the expressed legislative intent nor finds a clear source in constitutional law. Such an application would lock the patient into a vise which would prevent him from waiving the privilege without the psychotherapist's consent. The question whether such a ruling would have the medical merit claimed by petitioner must be addressed to the Legislature; we can find no basis for such a ruling in legal precedent or principle."

It should be remembered that "since the exception compels disclosure only in cases in which the patient's own action initiates the exposure, 'intrusion' into a

patient's privacy remains essentially under the patient's control." *(In re Lifschutz, supra,* 2 Cal.3d 415, 433.)

Petitioner makes certain contentions which he claims were not made or fully considered in *Lifschutz.* The first is that *Lifschutz* did not answer the claim that the medical profession cannot practice psychotherapy successfully "under the *Lifschutz* formulation of privilege waiver." It appears to us that the Supreme Court answered the claim rather well. In part, it stated: "Although petitioner has submitted affidavits of psychotherapists who concur in his assertion that total confidentiality is essential to the practice of their profession, we cannot blind ourselves to the fact that the practice of psychotherapy has grown, indeed flourished, in an environment of non-absolute privilege. No state in the country recognizes as broad a privilege as petitioner claims is constitutionally compelled. Whether psychotherapy's development has progressed only because patients are ignorant of the existing legal environment can only be a matter for speculation; psychotherapists certainly have been aware of the limitations of their recognized privilege for some time. [Citations.]

"Petitioner's broad assertion, moreover, overlooks the limited nature of the intrusion into psychotherapeutic privacy actually at issue in this case. As we explain more fully in Part III *infra,* the patient-litigant exception of section 1016 of the Evidence Code compels disclosure of only those matters which the patient himself has chosen to reveal by tendering

them in litigation." *(In re Lifschutz, supra,* 2 Cal.3d 415, 426-427.)

Petitioner makes the astounding contention that some members of the medical profession when called upon to testify as to a patient's condition have "found it necessary to forget," indicating that to keep those members honest they must be given absolute confidentiality. We doubt that there are many such members.

Petitioner refers to the duty of a physician to do no harm to his patient, and contends that by disclosing the patient's mental condition the patient may be harmed. If so, it would be for the patient's advisers to determine whether the patient should withdraw his claim for damages for that particular condition or to agree to disclosure under conditions which would protect the patient as far as possible and yet not deny the litigant sued his rights. "[T]he exception [Evid. Code, § 1016] represents a judgment that, in all fairness, a patient should not be permitted to establish a claim while simultaneously foreclosing inquiry into relevant matters." *(In re Lifschutz, supra,* 2 Cal.3d 415, 433.)

Petitioner refers to the 1972 amendment to the California Constitution which added to the inalienable rights guaranteed by Article I, section 1, the right of privacy and contends that the exception we are dealing with violates the rights of privacy of both plaintiff and petitioner. In support of his position petitioner cites *City of Carmel-by-the-Sea v. Young* (1970) 2 Cal.3d 259, which held the 1969 financial disclosure law (Gov. Code, §§ 3600-3704) which required

every public office and each candidate for public office to file a certain financial statement as to his investments to be unconstitutional as violating the right of privacy of the person affected. He also cites the United States Supreme Court cases of *Roe v. Wade* (1973) 93 S.Ct. 705, and *Doe v. Bolton* (1973) 93 S.Ct. 739, in which the court struck down the abortion statutes of Texas and Georgia, on the ground that they violated the constitutional right of privacy. In the latter case Justice Douglas pointed out, among other matters, that the requirement in the statutes that the abortion procedure must be approved by an abortion committee violated the right of privacy of the woman desiring an abortion and of her doctor. The situations in those cases are a long way from the situation in the case at bench. There the violation of the right of privacy was forced on the individual. In the instant case it is the action of the individual himself who, in order for financial gain, is required to waive the particular right of privacy.

Petitioner has cited no authority holding that a litigant may seek damages for a physical or mental condition he claims to exist, without disclosing the knowledge of his condition by the one most likely to know it —his physician.

2. *Psychiatrically cognizable conditions were in issue.*

As to her injuries plaintiffs complaint alleges that she "suffered personal injuries and pain and suffering and damage to, including, but not limited to, her

right knee, back and neck," and that "plaintiff suffered personal injuries and pain and suffering and damage, including, but not limited to, an aggravation of the injuries suffered in the [first accident]." Plaintiff also alleged that she "incurred and will incur medical and related costs in an amount not presently ascertainable" and "will incur a loss of income in an amount not presently ascertainable."

Plaintiff and her counsel originally waived her privilege, but later after petitioner purported to assert the privilege, plaintiff filed a notice of intention to revoke the waiver and to claim the privilege. The record fails to show whether any court action followed the filing of this notice. However, the authorities are clear that plaintiff must either waive the privilege or withdraw any claim for damages resulting from a condition as to which petitioner could testify. For the purposes of this opinion we will assume that if such a condition exists plaintiff has waived her privilege, and will consider her contention that no such condition exists, in other words, that she is not seeking recovery for any psychiatrically cognizable condition.

That plaintiff is claiming psychiatric injuries from the accidents and that she consulted petitioner concerning them clearly appears from her testimony at her deposition and from her counsel's statements. Her counsel stated:

"Although Miss Seebach makes no specific claims for psychiatric damage in the underlying civil liti-

gation, confining her pleadings to generalities, it is apparent that overlays of generally psychiatric nature are involved. She has been seen during the litigation for evaluation and possible testimony by Dr. Hume, a psychiatric diagnostician who did not treat her. Dr. Hume testified that Miss Seebach had, at the time of her examination, a mild, non-psychiatrically cognizable depression resulting from the accident, but also had a personality generally which would benefit from psychiatric treatment, this latter aspect being unrelated to the accident as to causation. It is evident from Dr. Hume's deposition . . . that these preexisting aspects of personality were involved in the psychotherapy which Miss Seebach received from Dr. Caesar."

Counsel further stated, "it appears that some of the care and treatment [by petitioner] may be involved in this lawsuit" and that Dr. Klemme, who treated plaintiff, and others wondered if, because of injury to her neck and head, "there is a conversion reaction here, or whether there is a depressive reaction."

Plaintiff testified that she went to petitioner because of "various reactions [she] had to things in [her] life" since the accidents, and that Dr. Klemme advised her to see petitioner in hopes that "the limitations that I have had to learn to live with could, you know, be discussed openly, so that I can better adjust to what life—how I can live my life better."

Plaintiff testified "due to these accidents my life style has changed considerably." At oral argument,

it was conceded that plaintiff was not suffering from any physical disability but her whole claim is based upon pain and suffering and her depressed, nervous and discouraged condition resulting from the accidents.

Dr. Hume, consulted by plaintiff, testified that "she appeared to me genuinely mildly depressed as a reaction to the kinds of changes that have occurred in her life as a result of her disabilities," that she needed "specifically psychiatric treatment," and that "her impression was that the reason the psychiatrist, Dr. Caesar, was called in in connection with her case, I believe, after the most recent accident in 1969, that the people that were taking care of her . . . felt that there was some emotional overlay to her problems, that she was magnifying her distress, . . ." Dr. Hume thought plaintiff needed help with her "depression."

The Court found "that the issue tendered by Plaintiff in this litigation is to what extent is whatever mental or emotional distress she has experienced since the accident [sic] attributable to these accidents. In determining this issue it would be necessary to inquire into Plaintiff's present condition and also elicit any information which would bear on her mental and emotional problems prior to the accidents. It would also appear clear that Plaintiff consulted Dr. Caesar concerning mental and emotional distress which she attributes, at least in part, to the accidents."

As the record now appears it is clear that plaintiff is claiming psychiatric injury from her accidents and

therefore that Petitioner's testimony would be relevant[4] and that the privilege exception would apply.

3. *The court order.*

The intrusion into plaintiff's psychotherapeutic privacy in this case is limited and, as said in *In re Lifschutz, supra,* 2 Cal.3d 415, 427, disclosure can be had of those matters only which the patient herself has chosen by tendering them in litigation. A physician is only required to disclose a patient's "medical treatment and communication concerning the very injury and impairment that was the subject matter of the litigation." (*Roberts v. Superior Court* (1973) 9 Cal. 3d 330, 337, quoting *Lifschutz, supra,* at p. 434.)

The Trial Court in its order limited it to requiring Petitioner to answer only eleven questions which at the taking of his deposition he declined to answer. We have examined those questions and find that they are directly related to plaintiff's psychiatric condition which plaintiff and her counsel claim resulted from the accidents and should be answered by Petitioner. We have in mind "[i]n determining whether communications sufficiently relate to the mental condition at issue to require disclosure, the Court should heed the basic privacy interests involved in the privilege [citation]; in general, the statutory psychotherapist-patient privilege 'is to be liberally construed in favor

[4]The transcript of petitioner's deposition shows that he supplied his "records" concerning plaintiff to defendant's counsel, as both plaintiff and her counsel had given him permission to testify. Petitioner's action in refusing to testify is rather interesting in view of his giving his records to counsel.

of the patient.' [Citations.]" (*In re Lifschutz, supra,* 2 Cal.3d 415, 437.) There is nothing appearing from the eleven questions which would indicate an answer referring to any condition of plaintiff's other than a condition for which she is seeking pecuniary recovery. However, the order does not provide protective measures "to regulate the procedure of the inquiry so as to best preserve the rights of the patient." (*Lifschutz, supra,* p. 437.)

In this case, if plaintiff disavows any claim of psychiatric injuries from the accidents, the Trial Court should set aside its order. (See *Roberts v. Superior Court, supra.*)

At oral argument counsel for the California Medical Assocation suggested that if plaintiff's advisers fear the effect on plaintiff herself of Dr. Caesar's answers to the questions ordered by the Court, Dr. Caesar's examination could be held in plaintiff's absence, and that before the doctor's deposition is read to the jury a hearing be held before the Court *in camera.* The Court could then strike out any material which it ruled was not relative to the claim for damages. This suggestion may have merit, but there may be other proposals for protective orders which counsel for both parties and those of the California Medical Association could present to the Trial Court. "Even when the confidential communication is directly relevant to a mental condition tendered by the patient, and is therefore not privileged, the codes provide a variety of protections that remain available to aid in safeguarding the privacy of the patient. When inquiry

into the confidential relationship takes place before trial during discovery, as in the instant case, the patient or *psychotherapist* may apply to the Trial Court for a protective order to limit the scope of the inquiry or *to regulate the procedure of the inquiry* so as to best preserve the rights of the patient." (*Lifschutz, supra,* at p. 437; emphasis added.)

The petition is denied so far as it seeks to set aside that portion of the order requiring Petitioner to answer the questions certified to the Court. However, the cause is remanded to the Trial Court for it to consider whether measures for the protection of plaintiff may be required without injury to the rights of defendants.

Bray, J.*

We concur:

Devine, P. J.

Good, J.**

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*Retired Presiding Justice of the Court of Appeal sitting under assignment by the Chairman of the Judicial Council.

**Retired judge of the superior court sitting under assignment by the Chairman of the Judicial Council.

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-804

GEORGE R. CAESAR, M.D.,
Petitioner,

vs.

LOUIS P. MOUNTANOS, as Sheriff
of the County of Marin,
State of California, et al.,
Respondent.

Reply Brief on Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

KURT W. MELCHIOR
One Embarcadero Center,
25th Floor
San Francisco, California 94111
Telephone (415) 398-3344
Counsel for Petitioner

SEVERSON, WERSON, BERKE & MELCHIOR
NICHOLAS S. FREUD
JAN T. CHILTON
Of Counsel

SORG PRINTING COMPANY OF CALIFORNIA, 346 FIRST STREET, SAN FRANCISCO 94105

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Respondent.

Reply Brief on Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Pursuant to Rule 24, subdivision 4, of the Rules of the Supreme Court of the United States, this Reply Brief is submitted, addressed to arguments first raised in the Response in Opposition to the Petition for Certiorari.

ARGUMENT

Although the Response also contains many other misstatements, this brief deals only with respondents' contention that Dr. Caesar lacks standing as to the issues presented in his Petition for Certiorari because his patient, Miss Seebach, voluntarily waived the psychotherapist-patient privilege. This argument, and the characterizations

of the Petition which are based upon it, consume the major portion of the Response. As shown below, however, the record does not support respondents' thesis; the record is, in fact, to the contrary.

Respondents' argument is based upon a letter which Raymond E. Bright, Miss Seebach's attorney, sent to the Court of Appeals after the Petition for Certiorari was filed in this Court. That letter, which is not a part of the record, is reproduced as Appendix B to the Response, and it does suggest that "*after* the Superior Court's ruling, plaintiff [Miss Seebach] has not claimed any privilege." (Emphasis supplied.) There are certain intimations to this effect in other letters, cited in Appendix B, which Mr. Bright sent to counsel inviting settlement of Miss Seebach's underlying personal injury litigation. Each of the cited letters was written after the contempt adjudication and while this case was pending before the Ninth Circuit Court of Appeals.

Until that time—well after Dr. Caesar had been adjudged in contempt—no clear suggestion of voluntary waiver had been made by Miss Seebach or her attorney. The record reflects that before he was deposed, Dr. Caesar met with Miss Seebach and Mr. Bright, and Miss Seebach acted ambiguously. To quote Dr. Caesar's deposition:

> Q. You have discussed with Miss Seebach the fact that you have been subpoenaed and that this subpoena directed you to come here?
>
> A. That is correct.
>
> Q. When you discussed this fact with Miss Seebach, did she then orally give her permission for you to come and testify?
>
> A. Miss Seebach cried when first asked about this. It took her a long time to reply and, finally, rather indirectly, I think, said something like "You will have to do it anyway."

> I then asked her directly whether she was giving consent and she nodded.
>
> Q. Nodded in the affirmative?
>
> A. That's correct. I then asked her if I had my secretary bring in a form, which is a standard form in my office to give permission for the conveying of information to parties other than myself, and she replied that she could not sign.
>
> Q. Did she tell you why she would not sign?
>
> A. I asked her directly if she wished me, as she had said, to testify, why she would not sign. Now, she gave me no answer. (Deposition of Dr. Caesar, taken April 5, 1972, Attachment 1, Exh. D to Petition for Writ of Habeas Corpus, pp. 7-8.)

Thereafter, Miss Seebach's attorneys filed in the Superior Court a document entitled "Notice of Intention to Claim Psychotherapist-Patient Privilege Granted By Evidence Code Section 1014 and to Revoke Earlier Waiver, If Any, of Said Privilege." (Attachment 1, Exh. H to the Petition for Writ of Habeas Corpus.) That document remains the last formal statement of her position.

After his petitions for certiorari and hearing had been denied by the California Court of Appeal and Supreme Court, Dr. Caesar finally came again before the Superior Court for adjudication of contempt and sentence. (Attachment 5 to Petition for Writ of Habeas Corpus.) Mr. Bright appeared and took an ambiguous position as to whether Miss Seebach had waived the privilege. The Superior Court ruled that the privilege had been waived as a matter of law, due to the compulsion of Evidence Code Section 1016, so that it need not consider whether Miss Seebach had voluntarily waived the privilege. The Superior Court placed the issue before it in focus in the following words:

> THE COURT: But, in any event, the problem of the patient's privilege is not with us, because I have ruled

> that—that the patient has no right to assert the privilege having tenured [sic: tendered] the issue. (Attachment 5 to the Petition for Writ of Habeas Corpus, p. 7.)

Judge Hufstedler in the Court of Appeals explicitly recognized that this case has never involved any issue of voluntary waiver. As she stated:

> We are not dealing with Seebach's actual waiver—which was revoked—but with the implied-in-law waiver made by claiming pain and suffering. (Appendix to Petition for Certiorari, p. 23 n. 5.)

Since the record shows that Miss Seebach has not voluntarily waived her rights as a patient, the Petition for Certiorari does not raise the question whether there is an independent and separate constitutional right of psychotherapists to be free of compelled disclosures in order to permit them to practice their profession. (*Cf. Doe v. Bolton*, 410 U.S. 179, 199 (1973); *Singleton v. Wulff*, ... U.S. ..... (1976), and text of Petition for Certiorari at p. 6 n. 6.) Rather, the Petition challenges the abrogation by California Evidence Code Section 1016 of the patient's freedom to pursue her treatment while retaining her rights of privacy and exercising her rights as a litigant. The Petition seeks to vindicate the patient's constitutional rights to privacy of the psychotherapeutic session, due process and equal protection.[1] Dr. Caesar seeks no standing of his own and does not assert, as respondents would put it, "that the psychotherapist must be able to withhold information regardless of the wishes of his patient • • • reflect[ing] a paternalistic attitude • • •." (Response, 15.)

---

1. It is well settled that Dr. Caesar has standing to raise the constitutional rights of his patients. (*Griswold v. Connecticut*, 381 U.S. 479, 481 (1965); *Doe v. Bolton*, 410 U.S. 179, 188-9 (1973); *Planned Parenthood of Central Missouri v. Danforth*, ... U.S. ....., ... (1976); *Singleton v. Wulff*, ... U.S. ....., ... (1976); *In re Lifschutz*, 2 Cal.3d 415, 431-2 (1970).)

Respondents suggest that Dr. Caesar is asserting a right of psychotherapists superior and antagonistic to the claim of their patients. Such is not the case, as the Petition for Certiorari and the supporting amicus briefs make clear. Dr. Caesar contends that Section 1016 is unconstitutional in placing intolerable burdens upon patients and upon their healers, invading the patients' privacy. Nothing more was raised by him before this Court.

Finally, should the point be pertinent, Dr. Caesar is now here under sentence of imprisonment; and what is immediately before the Court now is his right to go free after he disobeyed the Superior Court's order to disclose treatment materials *solely* (as was pointed out above) under the compulsion of California Evidence Code Section 1016. Thus he is now asserting a direct and primary interest of his own, *i.e.*, that he should not be jailed for violating an unconstitutional law. (*Hensley v. Municipal Court*, 411 U.S. 345 (1973); *Doe v. Bolton*, 410 U.S. 179, 188-9 (1973).)

One final point: at page 8 of the Response, in a purported statement of the case, respondents make an offensive suggestion that is not supported anywhere in the record, to the effect that Dr. Caesar was obstructing both parties and that "[p]artly because of her experiences with Dr. Caesar, Miss Seebach was reluctant to meet with" a forensic psychiatrist engaged for the express purpose of giving testimony rather than treatment. The fact is that, as this examining psychiatrist testified, Miss Seebach told her that she had discussed her whole life experiences with Dr. Caesar and found his treatment helpful. (Attachment 1, Exh. C to Petition for Writ of Habeas Corpus, p. 18.)

The remaining contentions of the respondents are dealt with in the Petition for Writ of Certiorari.

CONCLUSION

It is regrettable that respondents have now sought for the first time to attack Dr. Caesar personally and thus to create a false picture of the issues which were before the Court of Appeals and which are presented by the Petition for Writ of Certiorari. The matters presented are objective and grave, and involve considerations of doctor-patient relations and patient privacy of the highest order, deserving the attention of this Court. The Petition for Certiorari should be granted and the contempt order annulled.

Respectfully submitted,

KURT W. MELCHIOR
One Embarcadero Center,
25th Floor
San Francisco, California 94111
Counsel for Petitioner

March 16, 1977.

SEVERSON, WERSON, BERKE & MELCHIOR
NICHOLAS S. FREUD
JAN T. CHILTON
Of Counsel

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1976

No. 76-804

GEORGE R. CAESAR, M.D.
Petitioner,

vs.

LOUIS P. MOUNTANOS,
as Sheriff of the County of Marin,
State of California, et al.
Respondents.

CALIFORNIA STATE PSYCHOLOGICAL ASSOCIATION BRIEF AMICUS CURIAE IN SUPPORT OF THE POSITION OF PETITIONER

IRWIN LEFF,
100 Bush Street,
San Francisco, California 94104,
Attorney for California State Psychological Association, Amicus Curiae.

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CALIFORNIA STATE PSYCHOLOGICAL ASSOCIATION BRIEF AMICUS CURIAE IN SUPPORT OF THE POSITION OF PETITIONER

CALIFORNIA STATE PSYCHOLOGICAL ASSOCIATION (hereinafter called the "Association") respectfully submits a brief *amicus curiae* in the instant case in support of petitioner's request for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit, as provided for in Rule 42 of the Rules of this Court. The written consent of counsel for peti-

tioner and counsel for the only respondent who appeared below has been obtained.

INTEREST OF THE ASSOCIATION

The Association is a professional organization of psychologists in the State of California, and is part of the American Psychological Association. Approximately 1,100 of its 2,500 members are licensed under the laws of the State of California to engage in the practice of psychology. The Association is the largest organization representing licensed psychologists in California.

The practice of psychology by licensed psychologists under California law (Business and Professions Code, Sec. 2903) includes psychotherapy. "Psychotherapist," to whom the psychotherapist-patient evidentiary privilege applies, is defined in the California Evidence Code (Sec. 1010) as including licensed psychologists as well as psychiatrists. The subject matter of the instant case, a psychotherapist's privilege to refuse to testify about his patient, therefore deeply concerns licensed psychologists who practice psychotherapy in California.

REASON FOR FILING A BRIEF AMICUS CURIAE

The Association is concerned that the Court recognize that the issue here presented is not the narrow complaint of one solitary practitioner. The total con-

fidentiality sought by the petitioner is vital to all psychotherapists, whether they be psychiatrists or licensed psychologists. The Association and its members desire the opportunity to present to the Court its views on the importance to all psychotherapists of the privilege sought by the petitioner. Interpretation of the California Evidence Code so as to deny the privilege to the psychotherapist will affect not only the personal liberty of the petitioner but will have a serious deleterious effect on the practice of psychology.

Licensed psychologists, for whom the Association speaks, stand in the same position as petitioner in respect to the psychotherapist's evidentiary privilege. They, too, face the danger of contempt proceedings for refusing to testify if they adhere to the standards of total confidentiality necessary to the psychotherapeutic process.

PSYCHOTHERAPY REQUIRES THAT THE EVIDENTIARY PRIVILEGE NOT TO TESTIFY HAVE NO EXCEPTIONS

In order effectively to practice psychotherapy, the psychotherapist must be able to assure his patient that, with no exceptions, the inner secret thoughts and ideas revealed by the patient to the psychotherapist will be confidential. The psychotherapist must urge his patient to reveal, with no reservations, the content of his thoughts as a necessary essence of psychotherapeutic technique.

Without the assurances of confidentiality, the flow of inner thoughts and material will dry up and the practice of psychotherapy will not be possible. Section 1016 of California Evidence Code denies the privilege of confidentiality to a psychotherapist if his patient has put in issue his mental and emotional condition. This law, if applied, requires that the psychotherapist warn his patient about a potential exception to the confidentiality to which he would otherwise adhere. The very raising of the issue in the context of the psychotherapeutic relationship would deny to the psychotherapist access to the material necessary to treat his patient.

For the reasons set forth in petitioner's brief, California Evidence Code, Section 1016, as applied, violates the First, Fourth, Fifth, Ninth and Fourteenth Amendments to the Constitution of the United States. The attempted resolution of the conflicting interests in presenting full information to the Court and preserving the confidentiality of the patient-psychotherapist relationship in *In Re Lifschutz* (2 Cal.3d 415, 85 Cal.Rptr. 829, 44 A.L.R.3d 1) has not succeeded. Psychologists, as psychotherapists, stand in fear that the practice of their healing art, using necessary and accepted techniques, will put them in jeopardy of confinement if, under this section of the Evidence Code, in violation of the Constitution of the United States, they are required to reveal their patient's confidential communications.

CONCLUSION

For the reasons set forth above, the Association prays that the Court grant to petitioner the relief requested.

Dated, San Francisco, California,
December 10, 1976.

Respectfully submitted,
IRWIN LEFF,
Attorney for California State Psychological Association, Amicus Curiae.

In the Supreme Court of the United States

October Term, 1976

No. 76-804

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HASSARD, BONNINGTON, ROGERS & HUBER

DAVID E. WILLETT, ESQ.

44 Montgomery St., Suite 3500
San Francisco, CA 94104
Telephone: (415) 982-8585

Attorneys for Amicus Curiae California Medical Association in support of Petitioner Dr. Caesar

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Amicus Curiae Brief of California Medical Association in Support of Petition for Writ of Certiorari to the United States of Appeals for the Ninth Circuit

STATEMENT OF INTEREST OF AMICUS CURIAE CALIFORNIA MEDICAL ASSOCIATION

Amicus curiae, California Medical Association ("CMA"), is a non-profit, unincorporated association consisting of more than 22,000 California physicians, and as such is the largest state medical asso-

ciation in the United States. Approximately 1,100 CMA members are psychiatrists, primarily engaged in the practice of psychotherapy. Petitioner George R. Caesar, M.D., is a member of the California Medical Association.

The CMA's primary purposes are to promote the science and art of medicine and the protection of the public health. The issue presented in this case is of crucial importance to the protection of the public health. Additionally, the ruling below will send physicians to jail if they fairly discharge responsibilities to patients attributable to the science and ethics of their profession.

Accordingly, we have reviewed the record on appeal in this case, and are familiar with the questions presented. On the basis of that review, counsel believes that the Supreme Court should grant certiorari in this case, and offer the following brief in support of Dr. Caesar's Petition for Writ of Certiorari.

ARGUMENIT IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

INTRODUCTION

The Petition should be granted for these reasons:

1. The testimony which is sought from Dr. Caesar deals with the matters clearly within the most fundamental and protected right of personal privacy.

2. The very nature of psychotherapy is such that the patient is unable to understand the full implications should a psychotherapist be forced to disclose confidences in the course of litigation, and thus the patient cannot give knowing and informed consent to such disclosures.

3. Forcing the psychotherapist to testify violates the patient's constitutionally protected right of privacy, threatening great harm to both his individual well-being and the welfare of the community.

4. Such forced disclosure serves no compelling or even useful state interest.

II.

THE PATIENT'S RIGHT OF PRIVACY WOULD BE VIOLATED IF THE PSYCHOTHERAPIST WERE FORCED TO REVEAL INTIMATE DETAILS OF THE PATIENT'S SEXUAL, FAMILY, MEDICAL, OR OTHER PSYCHOLOGICAL PROBLEMS.

A person has the right to be free from unwarranted governmental intrusions into his or her privacy. (*Griswold* v. *Connecticut*, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed. 2d 510 (1965).) This right of privacy is so fundamental that the Court has attributed the source of the right variously to the First, Fourth, Fifth, Ninth, and Fourteenth Amendments, as well as to the penumbra of the Bill of Rights. (See discussion in *Roe* v. *Wade*, 410 U.S. 113, 152-53, 93 S.Ct. 705, 726, 35 L.Ed. 2d 147, 176 (1973).) As eloquently summarized by Justice Brandeis, dissenting in *Olm-*

stead v. *United States*, 277 U.S. 438, 478, 48 S.Ct. 564, 572, 72 L.Ed. 944, 956, 66 A.L.R. 376, 391 (1928):

> "The makers of the Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings, and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions, and their sensations. They conferred, as against the government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men.

To delimit this right of privacy, the Court has defined certain 'zones of privacy' to protect individuals from state intrusion into intimate and personal activities. In the case of *United States* v. *Twelve 200 Ft. Reels of Super 8 mm. Film*, 413 U.S. 123, 127, n. 4, 93 S.Ct. 2665, 2668, n. 4, 37 L.Ed. 2d 500, 505, n. 4 (1973), the Court stated that the right of privacy "encompasses the intimate medical problems of family, marriage and motherhood." Surely a patient's discussion with his psychotherapist of such intimate problems as medical, family, marital or parental problems fall within the zone of privacy as contemplated by the Court. Indeed, it is through the discussion of such problems that the patient struggles toward healing in psychotherapy.

Consider, for example, a patient who seeks help for a psychosexual disturbance. In the course of treatment, the patient would surely reveal his most intimate secrets to the psychotherapist, if therapy is to be effective. The Supreme Court has already held that an individual's sexual relations are not properly probed by the State. *Griswold* v. *Connecticut*, *supra*; *Eisenstadt* v. *Baird*, 405 U.S. 438, 92 S.Ct. 1029, 31 L.Ed. 2d 349 (1972). Are an individual's *thoughts* of sex *less* private than the sexual act itself? When discussed in the course of psychotherapy, do such thoughts lose their intimate character? Surely, the inner thoughts, fancies, dreams, and depressions of individuals are deserving of the most sensitive protection under the constitutional right of privacy. Accordingly, they should not be invaded by requiring psychotherapists to disclose confidential communications.

Additionally, a particularized form of the constitutional right of privacy is evolving to protect the patient-physician relationship. This medical right of privacy would be violated in the present case if Dr. Caesar were required to testify. (*Planned Parenthood of Central Missouri* v. *Danforth*, ... U.S. ....., [44 U.S.L.W. 5197] (1976); *Roe* v. *Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed. 2d 147 (1973) (See especially, Douglas, J., concurring at 410 U.S. 209, et seq.); *Doe v. Bolton*, 410 U.S. 170, 93 S.Ct. 739, 35 L.Ed. 2d 201 (1973).) Under this medical right of privacy, a patient, in consultation with, and under

the care of, his physician may make important medical determinations free of governmental interference. (*Doe* v. *Bolton*, *supra*, and *Planned Parenthood of Central Missouri* v. *Danforth*, *supra*.)

III.

THE PSYCHOTHERAPEUTIC PROCESS REQUIRES CONFIDENTIALITY.

It may well be that the lower courts' insistence on forcing testimony from the psychotherapist is attributable to unfamiliarity with psychotherapy itself. Psychotherapy has recently been defined as "any procedure delivered by a licensed mental health professional that (1) relies on "*talking*" as the major component and (2) is based on any technique directly taught or simulated through training at a medical or other professional school." (Fix & Haffke, *Basic Psychological Therapies: Comparative Effectiveness*, 24 (1976).

Indeed, psychotherapy is a facilitative communication relationship in which the psychotherapist and patient interact. It is upon the interaction of psychotherapist and patient that the psychotherapeutic "healing" depends. The process of psychotherapy, however, is not one of simple exposition by the patient at the prodding of the psychotherapist, or the question and answer session which lawyers attuned to depositions may have in mind. (See, London, *Modes and Morals of Psychotherapy*, 12 (1964).)

Psychotherapy seeks to resolve the innermost conflicts of disturbed or distressed individuals. Through talking, the patient is encouraged to explore, expose, confront and cope with sources of his psychological problems. The most sensitive and painful areas of human emotions and experiences are often laid bare. Sources of repressed guilt or shame, latent longings —matters buried deep in the subconscious—are all called out and examined by the psychotherapist. As stated in *Taylor* v. *United States*, 222 F.2d 399, 401 (D.C. Cir. 1955): "The psychiatric patient confides [in his therapist] more utterly than anyone else in the world. . . . [H]e lays bare his entire self, his dreams, his fantasies, his sins, and his shame."

During the course of life, the mind defensively represses uncomfortable or distressing experiences into the subconscious. Often these experiences are a source of shame or anxiety to the patient. If the guilt or psychological discomfort of such experiences is so great that the patient's conscious mind suppresses it, then surely the patient does not desire to have this problem aired in the public record. As stated by Judge Hufstedler in her dissent below:

> The patient's innermost thoughts may be so frightening, embarrassing, shameful or morbid that the patient in therapy will struggle to remain sick, rather than to reveal those thoughts *even to himself*. The possibility that the psychotherapist could be compelled to reveal those

communications to anyone, let alone broadcast them in a legal proceedings, can deter persons from seeking needed treatment and destroy treatment in progress. (See, e.g., *Taylor* v. *United States, supra;* J. Katz, J. Goldstein & A. Dershowitz, *Psychotherapy, Psychoanalysis and the Law*, 726-27 (1967).)

Judge Hufstedler's recognition of the role of the subconscious—that which the patient will not recognize or admit *"even to himself"*—is crucial. The mental mechanisms by which each of us cope with life —successfully or unsuccessfully—are internal mechanisms of control unconsciously selected and operating automatically. The mechanism unconsciously selected to meet emotional needs and stresses and to provide a defense against anxiety, the extent of its employment and the degree to which it distorts the personality, dominates the behavior and disturbs adjustment, determine the measure of mental health. In his interaction with the patient, the psychotherapist searches for information about these subconscious processes. By their very nature, the patient does not recognize or understand processes as they take place in his own case, the significance of underlying information, or other factors which are significant to the psychotherapist. The patient does not have the psychotherapist's perspective on the course of therapy. Yet, those who would oppose this Petition would place the burden on the patient to protect the confidentiality of the relationship. The position of the opposition is

that a victim of an accident who suffers emotional problems and seeks psychotherapeutic help then waives all confidentiality by subsequently bringing suit. The opposition would say that the patient/victim controls the choice of disclosure. Yet the patient does not understand the psychotherapeutic interaction which is occurring in his case and thus cannot judge the impact of disclosure. Indeed, the patient probably does not know the significance of all he is saying in his therapy sessions. The patient, therefore, is wholly unable to give knowing and informed consent to subsequent disclosure by the psychotherapist of matters revealed by the patient to the psychotherapist. Thus, the psychotherapist must, for therapeutic as well as constitutional reasons, retain discretion to preserve the confidentiality of patient communications.

IV.

PRIVATE COMMUNICATIONS ARE THE ESSENCE OF PSYCHOTHERAPY.

Psychiatry, including psychotherapy, undoubtedly is still in its infancy as a science. In recent years, great strides have been made in remedying the hopelessness, fear, and despair afflicting the mentally ill. Psychotherapy is no longer reserved to the institutionalized patient. Increasing recognition of emotional illness means that anyone may be seen by a psychotherapist for professional treatment. The value of such treatment probably can be appreciated only by those who have sought such services, whether for

themselves or for family members. The importance of such professional treatment, to individuals or to the community, is self-evident. The relationship of the patient's right of privacy to the provision of this treatment is summarized by Dr. Caesar's attorney in making part of his objections to the questions as follows:

> "Dr. Caesar views his position as a psychotherapist administering such treatment as that of a healer in which his own personality and his own personal interaction with the patient are the tools of healing, and to force his personality to be put at a distance from the patient in any way in this manner would be to destroy the opportunity to be a healer."
> (Deposition of Dr. Caesar at page 15.)

At the subsequent hearing on Dr. Caesar's refusal to answer the questions, the doctor eloquently stated why he, as a psychotherapist, could not discuss the innermost secrets of his patient in this case.

> "Although I feel that any breach of confidence without my patient's consent is harmful to my relationship with my patient, *I have*, in compliance with your order, *answered questions when I felt the answer was not harmful in a more direct way other than simply by breaking the confidence.*
>
> In other words, I have gone through a somewhat difficult process of deciding *which answers would, in my opinion, be so harmful*

> *as to constitute a serious breach of the ethics of my profession. These questions I have refused to answer.*
> (Emphasis added, Transcript of Hearing p. 8.)
>
> * * *
>
> *Unlike other physicians . . . the relationship between the patient and the [psychotherapist] cannot be separated from the treatment itself. It is an integral part of that treatment.* If a neurosurgeon must report his objective findings in a case, if this goes against his patient's interest, his relationship with the patient may suffer, but the physical treatment given the patient will not be affected, but if a psychiatrist does the same thing, the treatment will be damaged, or destroyed, because the patient's trust in his doctor will be impaired by the disclosures, and this trust is an integral part of the therapeutic effect of the relationship on the patient.
>
> * * *
>
> Even if a patient never consults a particular psychiatrist again, his behavior in the courtroom can influence the patient's attitude toward the profession, and make him reluctant to consult another psychiatrist; even if he needs to do so."
> (Emphasis added; Transcript of Hearing pp 11-13.)

In short, Dr. Caesar steadfastly believed that disclosure of confidential information not only jeopardized the patient's constitutional right of privacy, but

also jeopardized the patient's health. As Dr. Caesar stated in his deposition testimony,

> "[to answer] would violate the ethics of my profession . . . the Hippocratic Oath and what has been called the first principle of medicine, *primum non nocere*, which literally translated means 'first no harm'."

The doctor, therefore, seeks to abide by the highest standards of medical ethics which require that the physician not do anything which would harm the patient. Those who would oppose the petition seek to compromise those standards.

V.

THE MATTERS COMMUNICATED FROM PATIENT TO PSYCHOTHERAPIST ARE OF SUCH A PRIVATE NATURE THAT THEY SHOULD BE PRIVILEGED.

> "Where there is a significant encroachment upon personal liberty, the State may prevail only upon showing a subordinating interest which is compelling." (*Bates* v. *Little Rock*, 361 U.S. 516, 524, 80 S.Ct. 412, 417, 4 L.Ed. 2d 480, 486 (1960).)

Physicians and others practicing psychotherapy are particularly incensed by the invasion of patient privacy for two reasons. First, it threatens great injury to the patient. Secondly, such invasion is unlikely to produce information of any real utility in the process of litigation. This latter factor is particularly frustrating to the psychotherapist, who recognizes that psychotherapy is an inexact science which depends heavily on trained but subjective evaluation and personal interaction between psychotherapist and patient. As a consequence, the psychotherapist can provide only minimal material which ought to be thrown into the balance in deciding lawsuits.

Chief Justice Burger, in an article critical of psychiatric opinions as an aid to determination of guilt or innocence, made observations which are probably applicable to psychiatry generally, and especially to psychotherapy, insofar as the legal process is concerned:

> "At best psychiatry is now an infant among the family of sciences. Just as the law can lay no valid claim to being truly scientific, neither perhaps can psychiatry and psychology; they may be claiming too much in relation to what they really understand about the human personality and human behavior. The adversary process functions fairly well—and that is all anyone can expect—using engineering experts and others in the physical sciences to explain and measure physical injuries and the causes of such injuries. In most of these areas there are concrete and objective factors to rely upon. The psychiatrist, on the other hand, presently has few such advantages, and the delicacy and refinement of his evaluations are all too often unsuited to the 'black and white,' 'all or noth-

ing' approaches of strongly partisan adversaries in a courtroom." 28 Fed.Prob. No. 2, p. 3 at p. 7 (1964).

In short, psychotherapy is as much a subjective art as an objective science. The raw material of psychotherapy consists of potentially the most embarrassing and sensitive feelings and thoughts of the patient. There are numerous schools of psychotherapy, each with its own set of interpretations. (See, e.g., Harper, *Psychoanalysis and Psychotherapy: 36 Systems* (1959). One wonders if the therapeutic analysis, which can be of great subjective value to the patient, can ever be of probative, objective value to a court. Amicus curiae suggest that this subjective realm be left to the privacy of the psychotherapist-patient relationship.

CONCLUSION

Lawyers, possessed of natural curiosity and the desire to leave no stone unturned in the discharge of an advocate's responsibility, tend to regard psychotherapists as they would other witnesses who have attended the patient. Judges and lawyers alike, respecting a traditional approach to the production of evidence, are impatient with the psychotherapists who refuse to behave like any other witnesses. The psychotherapist is criticized for "playing God," abrogating for himself the court's own role, in deciding what he will disclose. Psychotherapists are accused of failing to understand that confidentiality of communication is a right that belongs to the patient, and not the therapist,—a right that can be waived by the patient.

In fact, psychotherapists, particularly psychiatrists, understand that the legal right which is primarily at issue is not simply one of confidentiality of communication, but rather a larger, more firmly rooted right. It is the constitutional right of privacy. In respecting that right, the psychotherapist adheres to a responsibility incumbent upon any citizen, but particularly binding upon a professional whose most traditional obligation is "*first no harm*". No court would permit direct exploration of the most private thoughts of an individual who exercises his right of access to the judicial system. To permit such exploration through the interrogation of the psychotherapist is an even greater invasion of the individual's right of privacy, because that exploration is made possible by the coerced assistance of a professional able to describe subconscious processes which the individual himself could not and would not expose. The violence of this assault upon the right of privacy, and the potential consequences, to the patient and to society, have left Dr. Caesar and others in his circumstances without honorable choice. Dr. Caesar has not placed himself outside the law. He recognizes—as did Judge Hufstedler—that the fundamental right involved is a constitutional right, reserved to the individual who was his patient, which must be zealously protected.

Accordingly, we support this petition for certiorari, not simply for the protection of psychotherapists, but for the protection of the individual, and society generally.

Dated: December 10, 1976.

Respectfully submitted,

HASSARD, BONNINGTON, ROGERS
& HUBER
By DAVID E. WILLETT
Attorneys for Amicus Curiae California Medical Association in support of Petitioner Dr. Caesar

STATE OF CALIFORNIA }
COUNTY OF SAN FRANCISCO } ss.

AFFIDAVIT OF SERVICE BY MAIL

Joanna Katayanagi being sworn, says that she is a citizen of the United States, over 18 years of age, a resident of San Francisco County and not a party to the within action.

That affiant's business address is

44 Montgomery St., Suite 3500
San Francisco, California 94104

That affiant served 2 copies of the attached Amicus Curiae Brief by placing said copies in an envelope addressed to

David J. Costamagna, Esq.
4340 Redwood Highway
San Rafael, CA 94903

James D. Hammond, Esq.
Bacon, Stone, O'Brien & Hammond
One Post Street, Suite 3250
San Francisco, CA 94104

Douglas J. Maloney, Esq.
342 Civic Center
San Rafael, CA 94903

Raymond E. Bright, Esq.
463 Pacific Avenue
San Francisco. CA 94133

Irwin Leff, Esq.
Rosenthal & Leff, Inc.
100 Bush Street, Suite 428
San Francisco, CA 94104

George Frampton, Esq.
Rogovin, Stern & Huge
1730 Rhode Island Ave. N.W.
Washington, D.C.

Kurt W. Melchior, Esq.
Severson, Werson, Berke & Melchior
One Embarcadero Center, 25th Floor
San Francisco, California 94111

which envelope was then sealed and postage fully prepaid thereon, and thereafter was on December 13, 1976, deposited in the United States mail at San Francisco, California. That there is delivery service by the United States mail at the place so addressed, or regular communication by United States mail between the place of mailing and the place so addressed.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on December 13, 1976, at San Francisco, California.

Joanna Katayanagi

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-804

GEORGE R. CAESAR, M.D., *Petitioner,*

v.

LOUIS P. MOUNTANOS, as Sheriff of the County of Marin, State of California, *et al., Respondents.*

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF AMERICAN PSYCHIATRIC ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF THE GRANT OF CERTIORARI

GEORGE T. FRAMPTON, JR.
ROGOVIN, STERN & HUGE
1730 Rhode Island Avenue, N.W.
Washington, D.C. 20036

Attorney for Amicus Curiae

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

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BRIEF OF AMERICAN PSYCHIATRIC ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF THE GRANT OF CERTIORARI

INTEREST OF AMICUS CURIAE

The American Psychiatric Association, founded in 1844, is the nation's oldest national medical society and largest professional organization of psychiatrists and psychotherapists. Its over 22,000 members comprise about 80 percent of all physicians who practice psy-

chiatry and specialize in the treatment of mental illness and emotional and psychological problems. The Association has a strong commitment to the care and treatment of persons who need psychiatric and psychotherapeutic care. In this regard, the Association believes that establishing an atmosphere in which such persons will be encouraged to seek needed assistance requires strict assurance of professional confidentiality. Moreover, the Association further believes that vigilant protection of confidentiality between the psychiatrist and his patient is absolutely essential to the success of psychotherapy as a course of treatment.

As the Court of Appeals for the Ninth Circuit recognized in the instant case, "psychotherapy is perhaps more dependent on absolute confidentiality than other medical disciplines." Psychotherapy probes the innermost reaches of the patient's personality and experience. During treatment the patient often is required to lay bare his most intimate and embarrassing thoughts, dreams, emotions and fantasies. These revelations typically include material that belongs to the patient's irrational and primitive self, which he has quite appropriately declined to share even with his closest loved ones. Indeed, some of these innermost thoughts may be so painful, embarrassing or shameful to the patient himself that he has repressed them—*i.e.*, removed them from his own conscious memory and stored them in his unconscious. In the therapeutic process this intimate and painful material is brought to consciousness and articulated only because it is necessary for treatment. If, however, such material were disclosed to family, colleagues, friends or the public, the results could be devastating. Thus, the possibility that the therapist might be compelled, even

in a courtroom, to reveal this kind of information about a patient to others can both serve as a strong deterrent to persons seeking needed treatment, and destroy treatment already in progress.

This case involves a California statute that poses a serious and continuing threat to meaningful psychotherapist-patient confidentiality. The Court of Appeals acknowledged here, as have the California courts, that the patient's interest in preserving the confidentiality of communications with his therapist during treatment is a constitutionally-protected one, falling squarely within the zone of personal privacy recognized by the leading decisions of this Court. By a 2-1 vote, however, the Court of Appeals held that the statute, as interpreted by the California courts, does not effect an unconstitutional intrusion on that right.

Amicus believes that the limiting construction placed on the statute by the California Supreme Court and relied upon heavily by the Court of Appeals below in sustaining its constitutionality is illusory. In practice, as this case itself demontrates, the limitations read into the statute by the California Supreme Court in an attempt to salvage its constitutionality have been impossible to apply and have failed to prevent significant disclosure by psychotherapists of their patients' intimate confidential communications.

Because this case presents a question of the extent to which an important and admittedly constitutionally-protected interest can be invaded by state regulation, and because the interest involved—psychotherapist-patient confidentiality—is central to the encouragement and success of psychiatric treatment, *amicus* believes that this is an appropriate case for review by this Court.

CONSENT OF THE PARTIES

Amicus is filing this Brief with the consent of both parties, whose letters of consent have been filed with the Clerk of this Court.

STATEMENT OF THE CASE

Petitioner, Dr. George R. Caesar, is a physician licensed in California, who for many years has been engaged in the private practice of psychiatry in Marin County, California.

In December 1969, Ms. Joan Seebach was referred to Dr. Caesar for psychiatric examination and treatment following an automobile accident in which she had been involved on December 4, 1969. The referral was made by other attending physicians because of the difficulty they had encountered in finding physical symptoms for Ms. Seebach's complaints. During the subsequent course of treatment, Dr. Caesar saw Ms. Seebach about twenty times for psychotherapy. According to the testimony of another psychiatrist, Dr. Caesar's treatment of Ms. Seebach concerned her "early childhood problems" and "went back into her history to see if she had some unresolved problems from earlier stages of her life with which [Dr. Caesar] could help her in dealing with the present."

In July and August 1970, Ms. Seebach filed personal injury actions in the Superior Court of the State of California for Marin County to recover damages for two successive automobile accidents, the one in December 1969 and an earlier accident in which she also had been involved.[1] In her complaints, Ms. Seebach alleged

[1] The two actions were subsequently consolidated.

that the accidents had caused her personal injury and pain and suffering, including mental and emotional distress.

In April 1972, attorneys for the defendants in these two actions took the deposition of Dr. Caesar, who, at that time, was no longer treating Ms. Seebach. Counsel sought to question Dr. Caesar about communications and information he had received from his patient. Dr. Caesar refused to answer these questions for the following reasons:

> "A. In my judgment, answering further questions and revealing her confidences could be harmful to her psychologically and detrimental to her future well-being.
>
> B. I do not feel I have received a valid consent from her to testify.
>
> C. The answers to questions asked me might not be relevant to this lawsuit and would, therefore, be unnecessary and unwarranted breaches of confidence."

Dr. Caesar's reluctance to divulge Ms. Seebach's confidential communications prompted her attorney to send her to another psychiatrist, Dr. Portia Bell Hume, "for evaluation for trial purposes, so that we would avoid this problem of having the treating psychiatrist be the one who is going to be in trial. . . ." Counsel also offered to make Ms. Seebach available to the defendants for diagnostic examination by a psychiatrist of their own choosing.

Dr. Hume's deposition was taken, and she testified fully concerning her examination and diagnosis of Ms. Seebach. According to Dr. Hume, Ms. Seebach appeared "genuinely mildly depressed as a reaction to

the kinds of changes that have occurred in her life as a result of her disabilities." Dr. Hume further stated that Ms. Seebach did not require any "specifically psychiatric treatment" for this depression; rather, the condition could be handled by "just human support" from her family, friends and colleagues.

Meanwhile, proceedings were brought in the Marin County Superior Court to compel Dr. Caesar to answer the questions proffered to him at his deposition, based on the provisions of California Evidence Code §§ 1014-1016. Under Section 1014, a psychotherapeutic patient has the privilege to refuse to disclose and to prevent others from disclosing confidential communications between the patient and doctor; Section 1015 permits the psychotherapist to claim this privilege on behalf of the patient. But Section 1016, in relevant part, provides:

> "There is no privilege under this article as to communications relevant to an issue concerning the mental or emotional condition of the patient if such an issue has been tendered by: (a) The patient . . . ."

Following a lengthy hearing, directed primarily to the validity of Section 1016, the court entered an order upholding the statute and its application to Dr. Caesar, and compelling his response to the deposition questions.

Ms. Seebach subsequently filed a formal notice stating that she did not waive her privilege with respect to communications with Dr. Caesar. She further indicated that she was limiting her "psychiatric claims to those described by Dr. Hume in her deposition." Nonetheless, the interrogation of Dr. Caesar, who appeared at the deposition pursuant to court order, continued.

Attempting to comply insofar as possible with the Superior Court's order, Dr. Caesar answered many of the questions concerning his treatment of Ms. Seebach. For example, Dr. Caesar testified that he had treated Ms. Seebach for injuries she had sustained in the accidents and that he had originally diagnosed her as suffering from moderate to severe depression. Dr. Caesar refused, however, to answer eleven further questions, on constitutional grounds and on the ground that to answer "would violate the ethics of my profession, * * * the Hippocratic oath and what has been called the first principle of medicine, *primum non nocere* which literally translated means first no harm."

At a subsequent hearing concerning Dr. Caesar's refusal to answer, he explained that he had voluntarily answered questions where he felt that the harm involved was no greater than simply the breaking of the confidence, but that he had refused to supply answers that would "be so harmful [to Ms. Seebach] as to constitute a serious breach of the ethics of my profession." Dr. Caesar also stated:

> "This patient consulted me of her own free will, at her attending physician's advice. She confided in me, which allowed me to make professional judgments about her. *It was implicitly understood, as it is with each psychotherapeutic patient, that everything she discussed with me, and my professional judgments about her, would be held in strict confidence.* The patient's purpose in consulting me was to seek help for her distress. *The question of litigation, or evaluation for this purpose, was never discussed or considered.* To

break the confidence of this patient in a manner harmful to her would be a violation of the trust she placed in me, and I must refuse to do so, because to do so, in my opinion, constitutes unethical practice.

* * *

"*Unlike other physicians . . . the relationship between the patient and the* [*psychotherapist*] *cannot be separated from the treatment itself. It is an integral part of that treatment.* If a neurosurgeon must report his objective findings in a case, if this goes against his patient's interest, his relationship with the patient may suffer, but the physical treatment given the patient will not be affected. But if a psychiatrist does the same thing, the treatment will be damaged or destroyed because the patient's trust in his doctor is an integral part of the therapeutic effect of the relationship on the patient." (Emphasis supplied.)

After this hearing, a contempt order was issued on December 12, 1972, and Dr. Caesar was committed to the custody of the County Sheriff. This commitment was stayed, however, pending review by the state and federal courts.

Thereafter, a writ of certiorari was denied by the California Court of Appeals, and a hearing was denied by the Supreme Court of California. Petitioner thereupon filed a petition for a writ of habeas corpus in the United States District Court for the Northern District of California, which was also denied. On appeal, the Court of Appeals for the Ninth Circuit affirmed, Judge Hufstedler dissenting in part.

ARGUMENT

I. COMPELLED DISCLOSURE OF CONFIDENTIAL COMMUNICATIONS BETWEEN A PATIENT AND HIS TREATING PSYCHOTHERAPIST UNDER THE CALIFORNIA EVIDENCE CODE VIOLATES THE CONSTITUTIONAL RIGHT OF PERSONAL PRIVACY.

A. The Right to Privacy of Psychotherapeutic Communications Is a Fundamental Constitutional Right.

1. Strict Confidentiality Is Essential to the Therapeutic Process.

By its nature, psychotherapy requires a patient to disclose his most intimate emotions, fears and fantasies. People usually enter psychotherapy because they have deep-seated conflicts and impairment of functioning which limit their ability to work effectively and to enjoy fully satisfying relationships with other people. To alleviate these blocks and conflicts, the therapist asks the patient to abandon "rational thought" and to express thoughts and fears that may never have been revealed to anyone else. In this manner, the roots of the conflict begin to surface. According to Freud, "[i]f a hysterical, phobic or obsessional idea can be traced back to the elements in a patient's mental life from which it originated, it simultaneously crumbles away and the patient is freed from it." Freud, "The Interpretation of Dreams," in 4 *Standard Edition of the Complete Psychological Works of Sigmund Freud* 100-101 (1958).

Often, these innermost thoughts are so painful, embarrassing or shameful that the patient has never before allowed himself to acknowledge them. In the therapeutic process, therefore, the patient typically is

required to pull out of his unconscious and bring into his conscious memory

> "... feelings and attitudes which are unacceptable *to the patient* ... [as well as] attitudes considered asocial or anti-social by the community. The unconscious is a storehouse of a lifetime's sinful wishes (and every man in varying degrees is a combination of Dr. Jekyl and Mr. Hyde)." Slovenko, *Psychotherapy, Confidentiality and Privileged Communications* 47 (1966) (emphasis supplied).

While disclosure of this material to the therapist is necessary for effective treatment, its dissemination to a patient's friends or loved ones may destroy their trust and love. Moreover, public disclosure of such private information is likely to cripple the patient's ability to function in society.

Failure to guarantee and enforce strict protection for the confidentiality of psychotherapeutic treatment disclosures will have two pernicious effects. First, it will deter patients who are in need of treatment from seeking it out in the first place, or from being sufficiently candid to allow for effective treatment. Second, disclosure will have a devastating effect on the course of treatment in progress for any patient whose therapist is compelled to make public his most intimate revelations. See, *e.g.*, Katz, Goldstein & Dershowitz, *Psychotherapy, Psychoanalysis and the Law* 726-27 (1967).

The courts increasingly have recognized the unique and critical role that confidentiality plays in psychotherapeutic treatment. The California Supreme Court itself has taken note of the "growing consensus throughout the country, reflected in a trend of legislative enactments, ... that an environment of confidentiality of treatment is vitally important to the successful operation of psychotherapy." *In re Lifschutz,* 467 P.2d 557, 560-61 (1970). And the court below in the instant case acknowledged that "psychotherapy is perhaps more dependent on absolute confidentiality than other medical disciplines." (Slip. Op. at 7.)

One of the reasons for this is the key element played in successful psychotherapy by the therapist's ability to create and maintain the patient's trust. As the late Judge Edgerton, quoting in part from Guttmacher & Weihofen, *Psychiatry and the Law* 272 (1952), stated in *Taylor* v. *United States,* 222 F.2d 398, 401 (D.C. Cir. 1955):

> "Many physical ailments might be treated with some degree of effectiveness by a doctor whom the patient did not trust, but a psychiatrist must have his patient's confidence or he cannot help him. 'The psychiatric patient confides more utterly than anyone else in the world. He exposes to the therapist not only what his words directly express; he lays bare his entire self, his dreams, his fantasies, his sins, and his shame. Most patients who undergo psychotherapy know that this is what will be expected of them, and that they cannot get help except on that condition. ... It would be too much to expect them to do so if they knew that all they say—and all that the psychiatrist learns from what they say—must be revealed to the whole world from a witness stand.' "

In short, as Dr. Caesar himself testified in this case, the confidential private relationship between the psychotherapist and his patient "cannot be separated from the treatment itself. It is an integral part of that treatment."

2. The Confidentiality of Psychotherapeutic Communications Is Protected by the Constitutional Right to Privacy, Which Is a "Fundamental" Constitutional Right.

This Court has held that "a right of personal privacy, or a guarantee of certain areas or zones of privacy does exist under the Constitution," and protects intimate personal activities and relationships touching upon the right to conception and abortion, marriage, procreation and other sexual activities, family relationships, child-rearing and education, and motherhood. *Roe* v. *Wade*, 410 U.S. 113, 153 (1973), and cases cited therein. Communications between a psychotherapist and patient in the course of treatment commonly involve the most intimate medical and psychological problems involving those very relationships of family, marriage, motherhood and fatherhood, and human sexuality.

Indeed, in *Doe* v. *Bolton*, 410 U.S. 179 (1973), and *Planned Parenthood of Central Missouri* v. *Danforth*, — U.S. —, 96 S.Ct. 2831 (1976), the Court explicitly tied the right of privacy to the physician-patient relationship. In *Bolton*, for example, the Court found that the committee approval requirement for hospital-performed abortions was constitutionally infirm because it substantially limited "the woman's right to receive medical care in accordance with her licensed physician's right to administer it. . . ." 410 U.S. at 197. Likewise, the Court found that the two-doctor concurrence requirement severely limits the patient's right to privacy and "unduly infringes on the physician's right to practice." *Id.* at 199. And in *Planned Parenthood, supra*, the Court held state requirements

for spousal and parental consent for abortion unconstitutional on the ground that "when the physician and his patient make that decision, the State cannot delegate authority to any particular person . . . to prevent abortion . . . ." 96 S.Ct. at 2841.

Both the California Supreme Court and the Court of Appeals below agreed that the patient's interest in keeping secret the confidential communications between himself and his psychiatrist during psychotherapy falls squarely within the zone of privacy protected by this Court's previous decisions. In *Lifschutz,* for example, the California Supreme Court unanimously stated:

> "We believe that a patient's interest in keeping such confidential revelations [as are disclosed in psychotherapy] from public purview, in retaining this substantial privacy, has deeper roots than the California statute and draws sustenance from our constitutional heritage. In *Griswold* v. *Connecticut, supra,* 381 U.S. 479, 484, the United States Supreme Court declared that 'Various guarantees [of the Bill of Rights] create zones of privacy,' and we believe that the confidentiality of the psychotherapeutic session falls within one such zone. (Cf. *People* v. *Belous* (1969) 71 Cal.2d 954, 963.) Although *Griswold* itself involved only the marital relationship, the open-ended quality of that decision's rationale evidences its far-reaching dimension." 467 P.2d at 567.

The majority below agreed with the California court's analysis, stating, "We have no doubt that the right of privacy relied on by Dr. Caesar is substantial." (Slip. Op. at 8.) Likewise, the dissenting judge explicitly found that confidential psychotherapeutic communications "have the indicia to place those communications

squarely within the constitutional right of privacy." (Dissent, Slip Op. at 3.)

Under this Court's decisions, the sensitive zone of personal privacy is protected as a "fundamental" constitutional right. *E.g., Planned Parenthood of Central Missouri* v. *Danforth, supra; Roe* v. *Wade, supra,* 410 U.S. at 156 (and cases cited therein), 163, 164. See also *Friendship Medical Ctr. Ltd.* v. *Chicago Board of Health,* 505 F.2d 1141 (7th Cir. 1974); *Word* v. *Poelker,* 495 F.2d 1349 (8th Cir. 1974); *Roe* v. *Ingraham,* 403 F. Supp. 931 (S.D.N.Y. 1975), *prob. juris. noted sub nom., Roe* v. *Whalen,* — U.S. — (1976) [44 U.S. L.W. 3471]; *cf. Runyan* v *McCrary,* — U.S.— (1976) [44 U.S.L.W. 5034]; *Yoder* v. *Wisconsin,* 406 U.S. 205 (1973). Thus, as the Court said in *Roe* v. *Wade, supra,* the appropriate test is not a simple balancing of the individual's right against the state's interest in regulation. Rather,

> "regulation limiting these rights may be justified only by a 'compelling state interest,' [citations omitted] and . . . legislative enactments must be narrowly drawn to express only the legitimate state interests at stake." 410 U.S. at 156.

Amicus submits that, upon analysis, the breadth of the intrusion on psychotherapist-patient confidentiality resulting from application of Section 1016 is unjustified by any compelling state interest, and that the statute, even as construed by the California courts, is not sufficiently narrowly drawn to express only those compelling interests, if any, that may be involved.

B. The Intrusion of California Evidence Code Section 1016 Upon the Constitutionally-Protected Right of Privacy Is Not Justified by Any Compelling State Interest.

1. Section 1016 Strikes an Inappropriate Balance Between the Patient's Right to Privacy and the State's Interest in Production of Relevant Evidence in Private Litigation.

Section 1016 incorporates a state-imposed involuntary waiver of the confidential relationship between a patient and his psychotherapist. The majority of the Court of Appeals held, without further explanation, that the state's "compelling interest to insure that truth is ascertained in legal proceedings in its courts of law" adequately supported this enforced violation of confidentiality. (Slip. Op. at 11.) The dissenting judge, however, concluded that even if this state interest weighed entirely on the side of the party adverse to the patient-litigant, "the patient's interest in his privacy would easily prevail over the state's general interest in the production of relevant evidence in a routine personal injury case." (Dissent, Slip Op. at 5-6.)

At the outset it should be noted that California has not recognized the importance of this supposedly "compelling" interest in many other areas. Rather, this "compelling" interest has frequently been overridden by stronger competing interests in privacy, privilege and nondisclosure. See, *e.g.,* Evidence Code §§ 950-962 (lawyer-client privilege); Evidence Code §§ 970-73 (spousal privilege); Evidence Code §§ 980-87 (confidential marital communications); Evidence Code §§ 1030-34 (clergyman-penitent privilege); Evidence Code §§ 1040-42 (official information and identity of informer); Evidence Code § 1050 (privilege of the

ballot); Evidence Code § 1060 (trade secrets); Evidence Code § 1070 (newsmen's privilege). Thus, for example, similar confidences between a priest and penitent about the penitent's private thoughts are not required to be divulged in the interests of a just disposition of litigation.

Furthermore, as Judge Hufstedler observed below, the balancing of competing interests is in reality not as simple as that suggested by the majority:

> "The public and private interests that are involved are more complex. The state is interested in effective access to the courts and in fair trials with respect to both plaintiffs and defendants in civil litigation. On the patient-plaintiff's side, the state also has interests in the deterrent effect of civil litigation upon potential tort-feasors, in the health of its citizens, and in the protection of privacy of its citizens. [Footnote omitted.] The economic interests of the plaintiff and defendant are also at stake." (Dissent, Slip Op. at 6.)

When these additional considerations are taken into account, *amicus* submits that the simple interest in getting *all* relevant evidence into a private litigation, regardless of the cost to a litigant's right to privacy, is not sufficiently compelling to justify the destruction of confidentiality envisioned by the California statute.

2. Section 1016 Fails to Reflect the Distinction Between the Treating Psychiatrist (in His Role as Healer) and the Diagnostic Psychiatrist.

Recognition of the state's interest in providing relevant evidence in private litigation does not require full disclosure of all related communications between

a patient-litigant and the psychotherapist(s) who have treated or are treating the patient. Such an approach fails to recognize the important distinction between the roles that the treating and diagnostic psychiatrists play in the patient's life.

The diagnostician is one who is called upon to examine a patient and determine his mental condition and its possible root causes. It is unnecessary for the diagnostician to determine whether treatment is indicated or, if so, what treatment would be preferable; most significantly, the diagnostician does not undertake to provide such treatment. Hence, he does not and need not establish and maintain an intimate relationship of trust and privacy with his patient. Nor is the patient led to expect that such a relationship will be inherent in his communications with the diagnostician to the same extent as with a treating therapist. The *treating* psychotherapist, by contrast, must enter into a trust relationship with his patient to accomplish the *healing* function—a relationship in which continuing confidentiality is essential.

The distinction between these roles is aptly illustrated by this case. Dr. Caesar refused to answer only those questions that he believed would be destructive of his role as *healer*. In addition, Ms. Seebach's attorney caused her to consult with an eminent diagnostician respecting the issue raised by her lawsuits, and tendered the diagnosis of that psychiatrist for the purposes of the litigation. Ms. Seebach also made herself available for diagnosis by a psychiatrist of the defense's choosing.

In short, as in this case, the need for disclosure of relevant information can easily be reconciled with the

patient's right of privacy by permitting or requiring testimony of diagnosing psychiatrists (an approach implicit in the holding proposed by the dissenting judge below), while protecting from disclosure communications between the litigant and therapists who have *treated* him. Given this access to alternate sources of relevant psychiatric data, the state's interest in full disclosure of all communications a patient-litigant has ever had with any treating therapist assumes a far less compelling position. Viewed from this more discriminating perspective, the opinion of the Court of Appeals cannot withstand constitutional scrutiny.

3. Invalidation of Section 1016 Will Not Unfairly Disadvantage Private Litigants Who Are Adverse to Patient-Litigants.

At bottom, the reasoning of the California Supreme Court in upholding Section 1016 in *Lifschutz, supra,* upon which the majority below relied *in toto*, seems to have been premised on a notion that it is "unfair to permit a patient-litigant to establish a claim while simultaneously foreclosing inquiry into relevant matters." 467 P.2d at 569. In light of the facts of the instant case and the availability of information from diagnostic psychiatrists, however, this analysis of "fairness" is far too simplistic.

Protection of confidentiality between the patient-litigant and treating therapists does not mean, as this case indicates, that the patient can "establish a claim" by testifying about her mental injuries while simultaneously foreclosing the defense from access to the only source of expert knowledge about that claim. Nor does enforcement of the patient's interest in privacy mean that patient's treating therapist may offer evidence in support of the patient as to his diagnosis, and remain insulated from cross-examination. On the contrary, when the patient raises an issue regarding his psychological or emotional state, the defense may be given the right to have a doctor of its own choosing examine the plaintiff. And, of course, the defense has the same right to examine any diagnosticians consulted by the plaintiff as do the plaintiff's own attorneys. Thus plaintiff and defendant are in reality afforded the same access in litigation to sources of information about the plaintiff's condition. This is all that fairness demands.[2] And, in view of the importance of the confidential relationship between the patient and his psychiatrist, this is all that the constitution allows.

The California court in *Lifschutz* also expressed the view that when a patient raises a specific ailment in litigation, he "in effect dispenses with the confidentiality of that aliment and may no longer justifiably seek protection from the humiliation of exposure." 467 P.2d at 569. Not only is this an inaccurate statement of the problem, it is inherently *unfair* to the patient-litigant.

In the first place, while the patient, by instituting litigation, does publicize the fact of an ailment, he does

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[2] By analogy, it should be noted that it is not generally regarded as "unfair" that civil discovery rules provide only for discovery of facts known and opinions held by persons whom an adverse party "*expects to call as expert witnesses at trial.*" These rules do not, however, generally permit discovery from experts specially retained in anticipation of litigation or for trial preparation. Moore, *Federal Practice* ¶ 26.66[3] and [4] (emphasis supplied).

not thereby make public all confidential communications involved in the treatment of that ailment. More important, the conditioning of access to the judicial process upon destruction of a psychotherapeutic patient's most private reservoir of personal secrets is based on a faulty constitutional premise. The patient is entitled to legal redress for injury just as any other claimant. The state cannot condition access to its judicial system—the sole means of enforcing the patient's right to compensation for his injuries—on surrender of a constitutional right. See, *e.g.*, *Shapiro* v. *Thompson*, 394 U.S. 618 (1969); *Griffin* v. *Illinois*, 351 U.S. 12 (1956). As this Court recently said in another context involving invasion of personal privacy:

> "[By going to court to obtain a divorce] respondent [did not] freely choose to publicize issues as to the propriety of her married life. She was compelled to go to court by the State in order to obtain legal release from the bonds of matrimony. We have said that in such an instance ' [r]esort to the judicial process . . . is no more voluntary in a realistic sense than that of the defendant called upon to defend his interests in court.' " *Time, Inc.* v. *Firestone*, ... U.S. ...., 96 S. Ct. 958, 965 (1976).

Accordingly, the state's interest in guaranteeing fairness in private civil litigation is just as fully protected as its interest in permitting full access to relevant evidence for all parties by limiting disclosure of psychiatric confidences to that material which the patient-litigant divulges to a *diagnostic* psychiatrist.

C. California Evidence Code Section 1016, Even as Construed, Is Not Narrowly Drawn.

1. THE CONSTRUCTION PLACED ON SECTION 1016 BY THE CALIFORNIA SUPREME COURT TO LIMIT ITS INTRUSION ON THE PATIENT'S PROTECTED RIGHT OF PRIVACY AND THUS TO SAVE THE STATUTE'S CONSTITUTIONALITY IS UNWORKABLE IN PRACTICE AND HAS NOT ACHIEVED ITS PURPOSE.

In *Lifschutz*, the California Supreme Court recognized that Section 1016, if literally construed, would result in "an intolerable and overbroad intrusion into the patient's privacy, not sufficiently limited to the legitimate state interest embodied in the provision and would create opportunities for harrassment and blackmail." 467 P.2d at 570. Accordingly, that court struggled to find a limiting construction of the statute that would eliminate these constitutional infirmities:

> "Under section 1016 disclosure can be compelled only with respect to *those medical conditions* the patient-litigant has 'disclosed . . . by bringing an action in which *they* are in issue' [citation omitted]; communications which are not directly relevant to those specific conditions do not fall within the terms of section 1016's exception and therefore remain privileged. Disclosure cannot be compelled with respect to other aspects of the patient-litigant's personality even though they may, in some other sense, be 'relevant' to the substantive issues of the litigation." *Id.* at 570 (emphasis in original).

For the reasons set out above, however, a reasoned analysis of the state's actual interest in production of relevant evidence in personal injury litigation demonstrates that an even narrower construction of the

statute would suffice to protect that interest—a construction protecting the privacy of treatment but not of diagnosis—so long as adverse litigants had access to adequate diagnostic data to contest the patient-litigant's claim.

The need for such a limiting construction is made more apparent by the fact that the California courts' approach has proven unworkable and impossible to apply in a manner protective of the right of privacy. In the instant case, Ms. Seebach sought voluntarily to limit her claim to those conditions determined to exist by the diagnostic psychiatrist she consulted for the purpose of litigation. Nevertheless, the trial court in effect ordered full disclosure of the communications she had with Dr. Caesar concerning her condition and the causes and treatment of it. As the trial court itself acknowledged:

> "You have to deal with the individual as a whole person . . . you can't compartmentalize her . . . to the extent that she is seeking compensation for the deterioration of her condition attributable to some conduct on the part of someone else, you have to explore all the factors that might have led to that deterioration."

The fact is that there is no effective way to separate out the mental problems allegedly caused by the conduct of a defendant from the complete range of factors that make up the patient-litigant's entire personality and experience.

The futility of the *Lifschutz* test was explicitly cited by the dissenting judge below as sufficient reason to justify imposition of a narrower interpretation of

Section 1016 in order to prevent an unconstitutional result:

> "The problem is that this formulation is almost impossible to apply, and, to the extent that it can be sufficiently refined to be able to apply it, the relevance test impermissibly encroaches on the patient's zone of protected privacy." (Dissent, Slip Op. at 7.)

In addition, under *Lifschutz* the burden is placed *on the patient* to show that a given confidential communication "is not directly related to the issue he has tendered to the court." 467 P.2d at 571. As Judge Hufstedler, dissenting below, pointed out:

> "The laymen-patient simply cannot be expected to diagnose his own illness, to determine for himself what mental conditions are in issue in the lawsuit, or to decide what evidence is or is not 'directly' related to the issue. Even a medically trained patient turned personal injury lawyer would be hard pressed in territory less slippery than mental health to prove the negative *Lifschutz* imposes upon him." (Dissent, Slip Op. at 7.)

Accordingly, Judge Hufstedler suggested that Section 1016 be construed to permit compulsion only of the psychotherapist's "ultimate diagnosis," *unless* the party seeking disclosure made a showing of "compelling need" for production of the information sought. In effect, this proposed test springs from the same conceptual roots as that proposed by *amicus* herein.

CONCLUSION

For the reasons set out above, *amicus* submits that this Court should grant the writ of certiorari in this case to determine whether California Evidence Code

Section 1016, as construed, still intrudes unjustifiably on the constitutionally-protected right of privacy inherent in the process of psychotherapeutic treatment.

Amicus further submits that the interest in privacy can be protected, and that the state's interest in production of evidence in civil litigation adequately vindicated, by a holding requiring that only confidential communications made during a diagnostic psychiatric examination—and not communications made in the course of treatment—may constitutionally be compelled under Section 1016.

Respectfully submited,

GEORGE T. FRAMPTON, JR.
ROGOVIN, STERN & HUGE
1730 Rhode Island Avenue, N.W.
Washington, D.C. 20036
(202) 296-5820

Attorney for Amicus Curiae

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